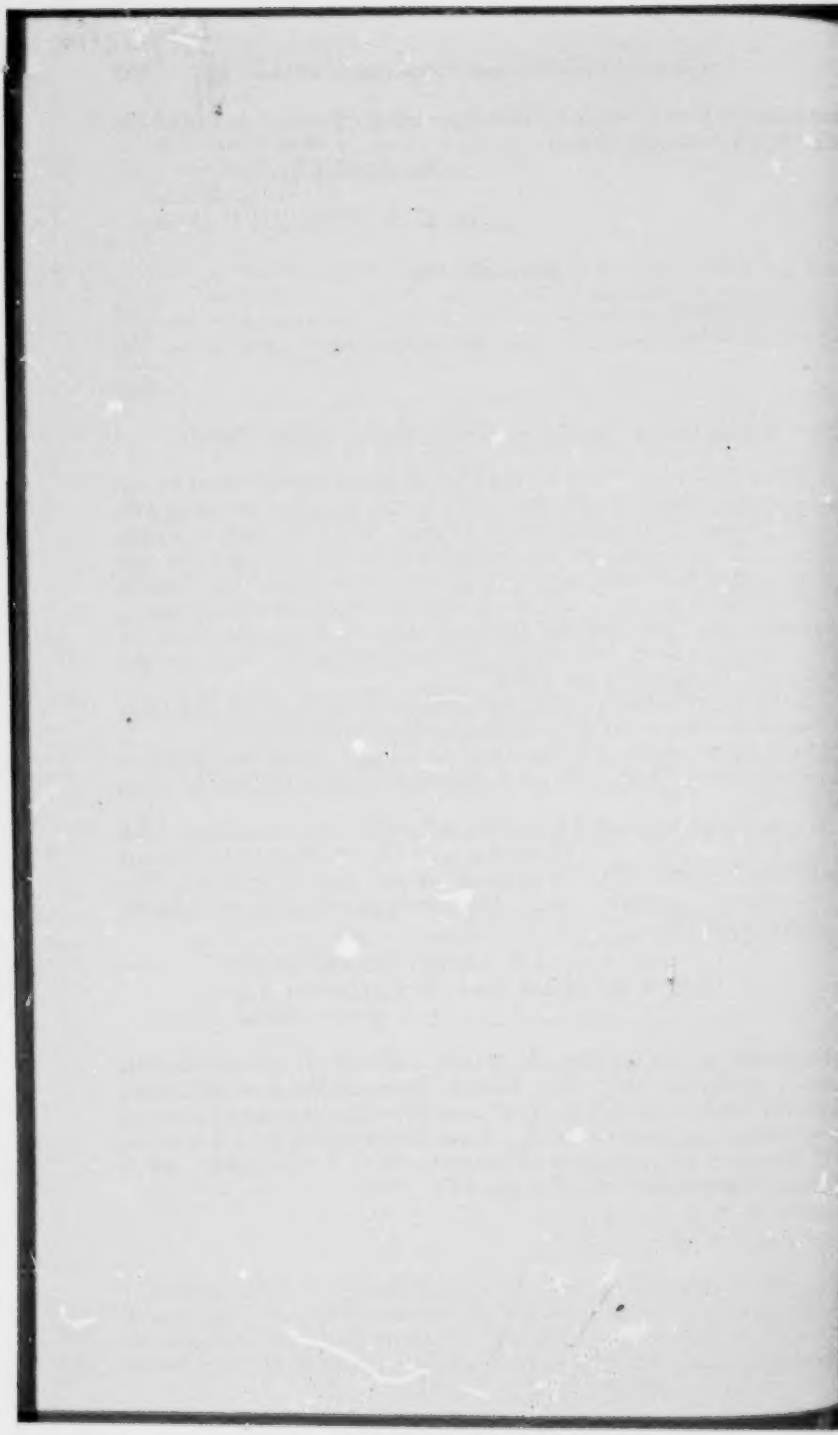


FILE COPY.

JAN 15 1908

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1908

No. [redacted] Docket No. [redacted]

[redacted]

APPELLANTS,

vs.

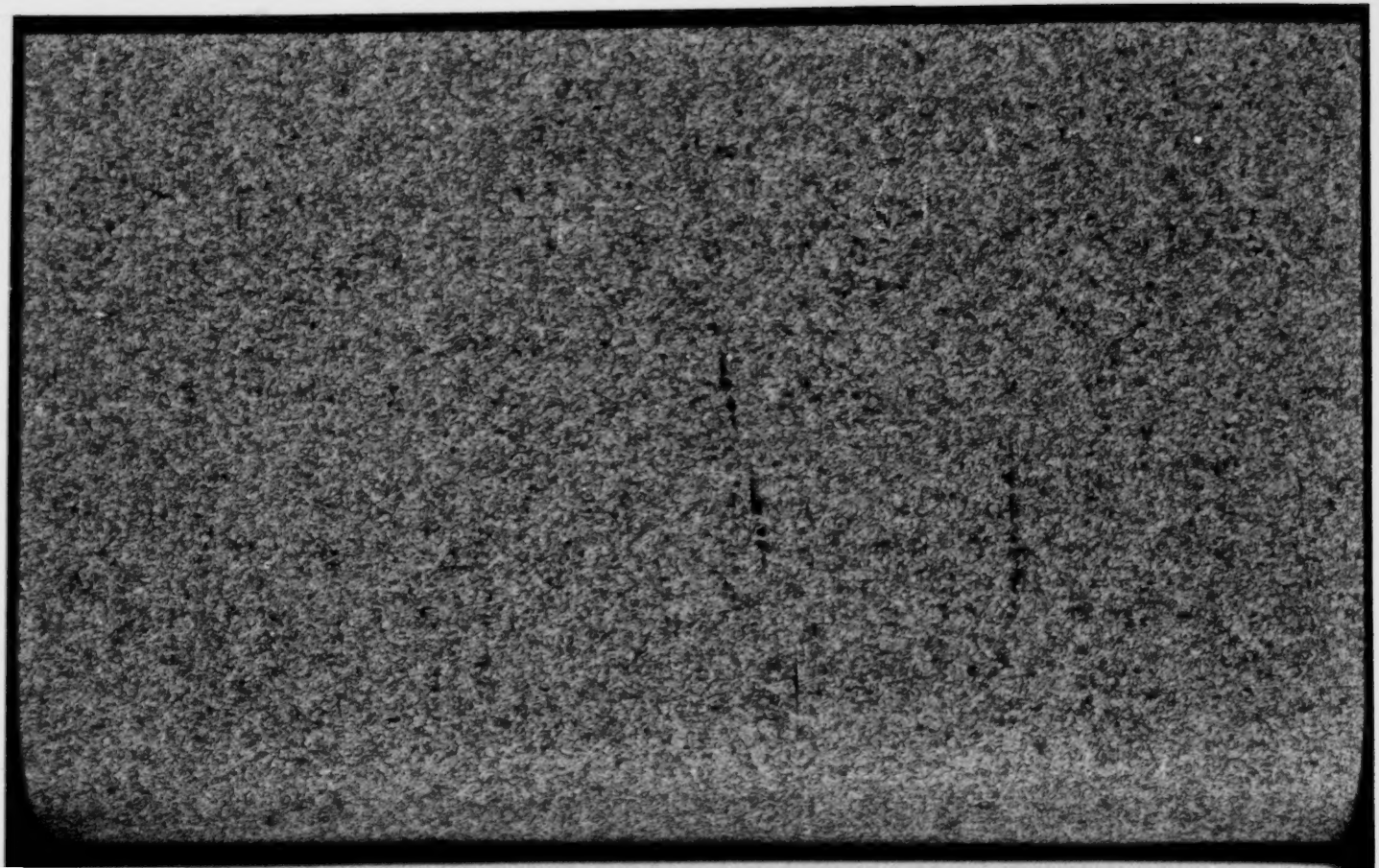
[redacted]

APPELLEES.

## BRIEF FOR APPELLANTS.

[redacted]

Attorneys for Appellants.



1869

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1902.

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No. 18258. Term No. 159.

THE FOURTH NATIONAL BANK OF SAINT LOUIS, FIRST NATIONAL BANK OF NEW YORK, and FORD HARVEY,
APPELLANTS,

vs.

MORTON ALBAUGH, Receiver First National Bank of Emporia, F. C. NEWMAN, Administrator of the Estate of C. S. Cross, Deceased, and WILLIAM MARTINDALE,
APPELLEES.

## BRIEF FOR APPELLANTS.

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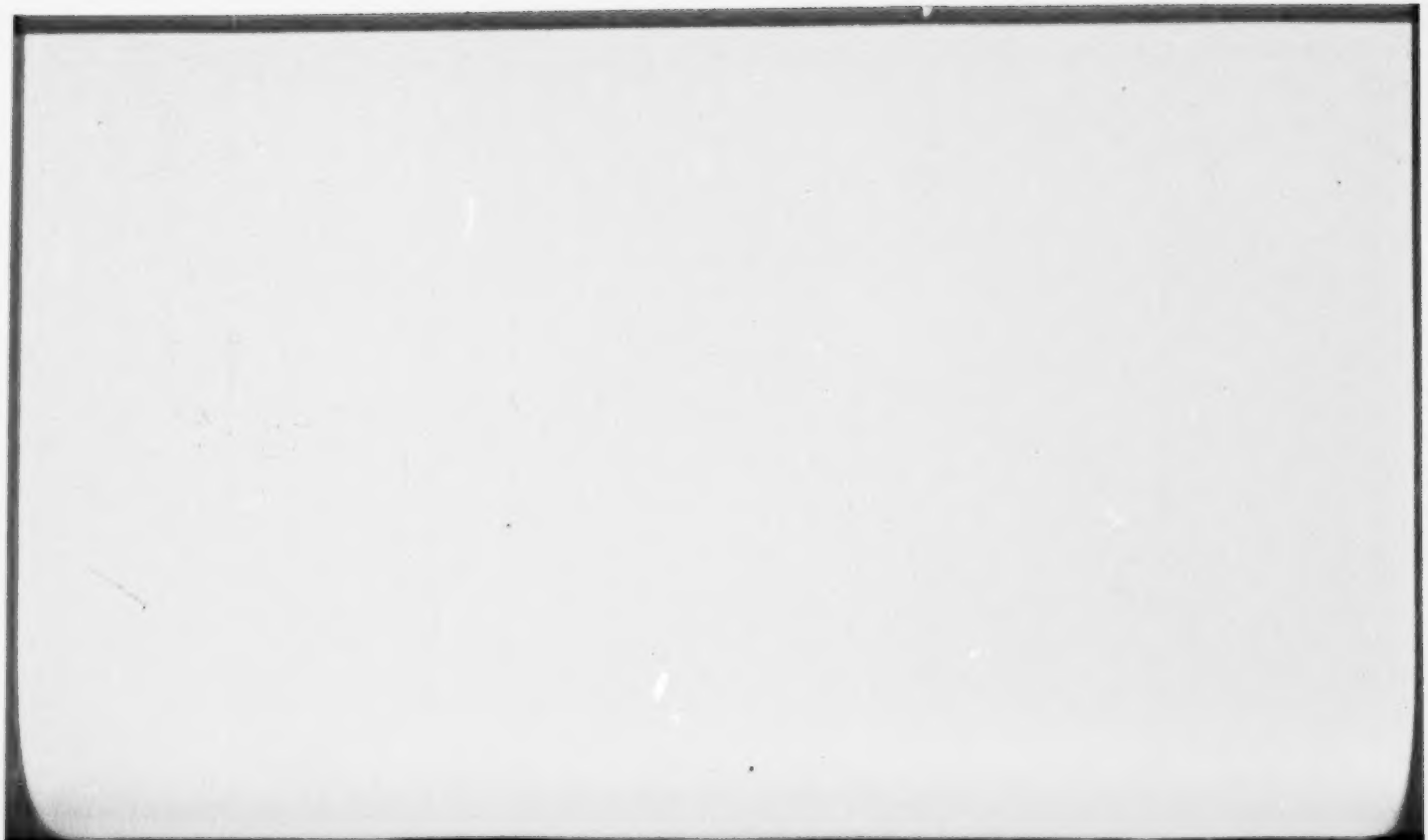
T. F. Garver,
J. B. Larimer,
Frank Hagerman,
C. N. Sterry,
*Attorneys for Appellants.*



## STATEMENT OF CASE.

This is a controversy between the Fourth National Bank of St. Louis, the First National Bank of New York, and Ford Harvey, upon the one side, and Morton Albaugh, as Receiver of the First National Bank of Emporia, Kansas, upon the other side, over the right to a fund of $53,396.89, on deposit in the Emporia National Bank of Emporia, Kansas, to the credit of the receiver, to abide the final determination of this case. The history of this fund, and a statement of the claims, of the several parties to it, are, briefly, as follows:

From January 12, 1892, to November 16, 1898, C. S. Cross was President, and Wm. Martindale was Vice-President, of the First National Bank of Emporia, Kansas, organized under the National Banking Act. Cross committed suicide on November 16, 1898, and upon that date, under the direction of the Comptroller of the Currency, one Jobes closed the Bank, taking possession of it, and its assets as receiver; he continued as such receiver until February 16, 1899, when he was succeeded by Appellee Morton Albaugh. The Bank, Cross, and Martindale, were each wholly insolvent at the time of the suicide of Cross, but Martindale having no knowledge of the fact of his own insolvency, or of the insolvency of either of the others until afterwards, believed himself, the Bank and Cross, to be perfectly solvent at the date of the closing of the Bank. For more than a year previous to Cross's death, Cross had been indebted to the appellant, the First National Bank of New York, in the sum of $30,000.00, which was evidenced by notes, renewed from time to time, and signed by Cross and Martindale, and indorsed by each of them. During the same time Cross was indebted to the appellant, the Fourth National Bank of St. Louis, in the sum of $20,000.00, evidenced by notes, renewed from time to time, which were indorsed by Martindale and Cross. On July

30, 1898, Cross borrowed from Ford Harvey, of Kansas City, Missouri, $10,000.00, for which he gave his note of that date, payable in six months, with seven per cent. interest. This note was indorsed on the back by Mr. Martindale. All the above indebtedness was the personal indebtedness of Cross, and as between him and Martindale, Martindale was only a surety as to the same.

For a long time preceding his death, Cross was indebted, directly and indirectly, to the Bank, in sums ranging from two hundred, to three hundred thousand dollars, the latter being about the amount of such indebtedness at the time of his death. At the time of his death, and for a long time previous, Cross was the owner of a large amount of live stock, and personal property, that was kept on a farm near Emporia, Kansas, known as the Sunny Slope Farm. This property was entirely unincumbered, except such liens thereon as may have been created by either or all of the three certain written instruments hereafter referred to. In the Spring of 1898, trouble had arisen between Cross and one Leibfried, which culminated, in June of that year, in an action commenced by Leibfried against Cross, in the District Court of Lyon County, Kansas (the County in which Emporia was situated).

In this action Cross was required to execute a bond, with sufficient surety, to pay any judgment that might be rendered against him.

July 1st Cross gave the bond required, signed by himself as principal, and by Wm. Martindale and one H. C. Whitley as sureties. This bond was approved by the court. If Leibfried had been successful, the amount that he could have recovered on this bond might have equalled the sum of $7,500.00. This case was subsequently tried, in October of that year, and resulted in a verdict in favor of Cross, and was finally dismissed, on October 30, 1899, all liability on this bond ceasing at that date. On July 15th Cross executed an instrument in writing, set out in the amended bill of complaint as exhibit C of such bill (Pr. tr. pp. 14, 15), and which was exhibit C in evidence on the hearing. (Pr. tr. p. 167.)

The following is a copy of this instrument:

"For and in consideration of one dollar and other valuable considerations the receipt of which is hereby acknowledged I do hereby sell, transfer and assign unto W. Martindale as trustee all my personal property of every kind and description and whatever located, except the contents of my house where I am now living in Emporia, Lyon Co., Kansas, excepting all my policies of life insurance—this sale does not include the notes pledged to my mother for the indebtedness I owe her, amounting to 8375.00 and int. which does not include the 4500 Davis & Cross note. The property which I transfer to the said Martindale is partially described as follows: All my live stock, cattle, hogs and horses, now located on Sunny Slope Farm, Lyon Co., Kansas, together with all other personal property thereon or on farm adjacent—also all notes, stock, bonds and mortgages (excepting as before stated those securing my indebtedness to my mother Sue S. Cross).

That said Martindale as trustee is first to protect H. C. Whitley and himself upon a certain bond in the Lyon Co. court, after that he is to pay himself for any paper upon which he and I are mutual makers or endorsers. The balance if any to be paid to the First Nat. Bank of Emporia, Ks., for all matter I owe them.

Given under my hand and seal this 15th day of July, 1898.

C. S. Cross."

On November 15, 1898, the day preceding Cross's death, he executed and delivered to Wm. Martindale another instrument in writing, attached to the amended bill as exhibit D, and read in evidence on the hearing as exhibit B. (Pr. tr. pp. 15 and 166.) A copy of which is as follows:

"Emporia, Kansas, Nov. 15, 1898.

For one dollar and other valuable considerations the receipt of which is hereby acknowledged, I hereby sell, transfer and assign unto W. Martindale or his assigns all my right, title and interest to the following personal property, located in Emporia Twp., Lyon county, Kansas, and upon what is known as Sunny Slope farm and the leased lands thereunto contiguous, all my cattle, horses and hogs, all feed, implements, hay, grain, etc. and also all other personal property located thereon whether specifically described herein or not.

Given under my hand and seal the date above written.

C. S. Cross."

At the time of Cross's death he had, as Manager of the Sunny Slope Farm, one Thomas Evans. Immediately after the death of Cross, Martindale informed Evans, that he had a bill of sale, of the stock, and asked him to keep charge, and care of it, the same as he had been doing, for his (Martindale's) account. This Evans agreed to do. A few days after this, Mr. Jobes, as receiver of the Bank, claiming that the Bank was the owner of the stock (by reason of Cross having fraudulently used the funds of the Bank to purchase this stock with), interviewed Evans, and told him that the Bank was the owner of the stock, and asked him to keep in charge of the stock for the Bank, which Evans also agreed to do. In the Summer and Fall of 1898, preceding his death, Cross had very extensively advertised the sale of his stock on Sunny Slope Farm (which consisted of very finely bred standard and grade Herefords) to take place at Kansas City on December 7, 1898. Immediately after Cross's death, one Fred Newmanwas appointed by the proper court administrator of his estate. At the time Martindale was claiming the right to this stock, under his bills of sale, and Jobes was claiming it as the property of the Bank, Newman, as such administrator, Ford Harvey and H. C. Whitley (the last two claiming through each of the above instruments in writing) were severally claiming the right of possession of this live stock, each asserting his claims to be superior to those of the others.

On November 29th each of these claimants, believing it to be for the best interest of all parties, to have the sale, which Cross had advertised, proceeded with, at the time and place advertised, entered into an agreement, in writing, as follows:

"November 29th, 1898.

Whereas, C. S. Jobes, receiver of the First National Bank of Emporia, Kansas, has taken possession of and claims the cattle and other personal property at Sunny Slope farm near Emporia, to be the property of said bank, and as such assets of said bank in his hands as such receiver, and

Whereas, F. C. Newman, administrator of the estate of C. S. Cross, deceased, claims said cattle and other personal property on said farm, to be the property of said estate and as such assets of said estate, and

Whereas, Ford Harvey, H. C. Whitley, Wm. Martindale, and other parties claim to have certain rights in said cattle and other personal property by virtue of bill of sale thereof, made by said C. S. Cross to Wm. Martindale, and

Whereas, all parties in interest are satisfied that it is to the benefit of all to have the public sale of a portion of said cattle at Kansas City, heretofore planned by said C. S. Cross go on and take place on Dec. 7th, 1898 as advertised. It is now stipulated and agreed that said C. S. Jobes, receiver as aforesaid, shall make said sale and as soon as possible sell the balance of said cattle and other personal property upon said farm for as much money as it is possible for him to obtain for the same, and out of the proceeds of said sale deduct all actual and necessary expenses incurred heretofore and which may be necessary in making said sale, and expenses in feeding and caring for said cattle and other personal property until sold. That he shall deposit the net proceeds derived from the sale of said cattle and other personal property in the Emporia National bank in the name of C. S. Jobes, receiver, and F. C. Newman, administrator, said net proceeds to be treated by all persons interested the same as though the cattle and other personal property were the subject-matter of litigation said funds to remain in said bank until a final decision is reached in the courts as to who the said funds belong to. It is expressly stipulated and agreed that none of the rights of the parties hereto in and to said cattle shall be prejudiced in any manner but that all of said rights shall (attached) to and be vested in the said net proceeds derived from the sale of said cattle and other personal property, as fully and to the same extent as to the said cattle and other personal property, and the making of this agreement and the sale of said cattle and other personal property shall work no estoppel against any of the parties hereto nor prevent the assertion of their rights to the net proceeds derived from the sale of said cattle and other personal property in any manner, in any court that they desire to assert their rights or could have asserted said rights to said cattle and other personal property, had they not been sold by said C. S. Jobes. It is hereby agreed in order that said cattle and other personal property may bring as much as possible and in order that there may not be any question raised as to title by purchaser, that said F. C. Newman as administrator, shall join

with the said Jobes and help sell said cattle and other personal property.

C. S. JOBES,
Receiver First National Bank of Emporia, Kansas.
F. C. NEWMAN,
Administrator of Estate of C. S. Cross, Dec'd.
L. B. KELLOGG and
CHAS. B. GRAVES,
Att'ys for Wm. Martindale.
E. W. CUNNINGHAM,
Att'y for H. C. Whitley.
WM. C. HOOK,
Att'y for Ford Harvey."

(Pr. tr. pages 83, 84.)

Pursuant to this agreement, the property was sold, and the net proceeds arising from the sale, amounting to the sum of $52,958.39, was deposited, in accordance with the terms of the agreement. (Pr. tr. pages 82, 83.) On February 28, 1898, the appellant, the Fourth National Bank of St. Louis, filed its bill of complaint, in the Circuit Court of the United States for the District of Kansas, against Morton Albaugh, as receiver of the First National Bank of Emporia, F. C. Newman, as administrator of the estate of C. S. Cross, deceased, the First National Bank of New York, Ford Harvey, H. C. Whitley and Wm. Martindale. Upon this bill of complaint, was an indorsement by Morton Albaugh, as receiver, F. C. Newman, as administrator of the estate of Cross, Wm. Martindale, H. C. Whitley and the First National Bank of New York, entering their several appearance in the action, and waiving the issuance and service of process therein. Subsequently, on April 10, 1898, the Bank filed an amended bill, (see pr. tr. pages 12 to 16, inclusive). The amended bill of complaint, set out in substance: the indebtedness of Cross to the complaint, in the sum of $20,000.00 upon certain notes; the fact that Martindale was an indorser upon and surety only as to such notes; that the bills of sale of Aug. 15 and Nov. 15 (which were plead in full as exhibits to the bill and amended bill) executed by Cross to Martindale pledged the property that was sold, to the payment of the indebtedness due to it upon

these notes, the indebtedness due from Cross to Ford Harvey and the First National Bank of New York, respectively, and the liability to Whitley, if any. The amended bill alleged that the receiver of the Bank was holding and claiming this fund as such receiver, and plaintiffs asked that its claim, the claim of the First National Bank of New York, and the claims of Ford Harvey and Whitley, be determined to be liens upon the fund, prior to any claim of the receiver thereon and that the fund be distributed *pro rata* to those parties. Newman, as administrator, filed an answer to the original and amended bills of complaint. (Pr. tr. pages 8 to 10, and 21 to 23.) Newman claimed, in his answer, that the instruments in writing, (above set out) executed by Cross to Martindale, were never *legally* delivered, and that they constituted no lien upon the property, out of which the funds in controversy were derived, and that Newman, as such administrator, was entitled to the entire proceeds (pr. tr. pp. 8, 9 and 21, 22). On April, 22, 1899, the First National Bank of New York filed its answer and cross-complaint. It, in substance, admitted and adopted the allegations contained in the amended bill of complaint, and alleged, that Cross was owing it, at the time of his death, $30,000.00, evidenced by a note upon which Martindale was an endorser, and that the property sold was pledged as security for the debt by the execution of the instruments referred to. (Pr. tr. pp. 17 and 18.) On the 28th of April, 1899, Martindale filed an answer, practically admitting the averments in the amended bill of complaint, but in addition thereto, alleging that the Union National Bank of Kansas City, Missouri, was the holder of a note for $10,000.00, which was secured by these instruments in writing, and alleging that it was a necessary party. (Pr. tr. pp. 18 and 19.) Newman filed a replication to the answer and cross-complaint of the First National Bank, and to the answer of Martindale (pr. tr. pages 23, 24), and also a supplementary answer, and amendment to the former answer, to the amended bill of complaint. (Pr. tr. pages 25, 26.) These were all the plead-

ings that were filed in the case, prior to March 21, 1900. On this last date, the case was dismissed, as to the defendant Ford Harvey, and leave was granted to him to file a petition of intervention, which was by him on the same day filed. (Pr. tr. pages 128 to 131.) The petition in intervention filed by Harvey claimed that there was due from Cross to Harvey $10,000.00, upon a promissory note upon which Martindale was endorser, and that the written instruments referred to, and attached to the amended bill as exhibits C and D were severally intended by Cross to secure this note as well as other notes and that the intervenor was entitled to a *pro rata* share of this fund through the security created by these bills of sale.

It further alleged that the matters set out in the bill of complaint, and in the cross-bill of the First National Bank, were true, and that Harvey, the Fourth National Bank of St. Louis and the First National Bank of New York, were entitled to receive the proceeds of the sale of the cattle *pro rata*, and that neither of the other parties had any interest in the fund. On the same date, March 21, 1900, by consent of all parties, Morton Albaugh, as receiver of the First National Bank, was permitted to file an answer to the amended bill of complaint, upon condition that each and every allegation contained in it should be understood as denied, by every other party to the action, without the filing of any formal replication. (Pr. tr. pages 131, 133 to 137.) The answer of Albaugh admitted that Cross at the time of his death was the owner of the property, from which the fund was derived, alleging, however, that, on the 4th of March, 1898, Cross, being indebted in a large amount to the First National Bank, desired to borrow from the Bank the additional sum of $50,000.00, and on that date, to secure all of his indebtedness to the Bank, executed and delivered to Martindale a bill of sale of the property from which the fund was derived, setting out a copy of the same as an exhibit. (Pr. tr. pp. 133 to 137.) The following is a copy of this instrument:

"BILL OF SALE OF PERSONAL PROPERTY.

Know all men by these presents, that in consideration of one dollar and other valuable considerations, the receipt of which is hereby acknowledged, I do grant, sell, transfer, and deliver unto W. Martindale as trustee, his heirs, executors, administrators, and assigns, the following goods and chattels, viz: all of my personal property of every kind and description and *what*ever located with the exception of my personal effects, insurance policies and the contents of my house in Emporia, Lyon county, Kansas.

To have and to hold, all and singular, the said goods and chattels, forever; and the said grantor hereby covenant– with the said grantee that he is the lawful owner of the said goods and chattels; that they are free from all incumbrances; that he ha– good right to sell the same as aforesaid, and that he will warrant and defend the same against the lawful claims and demands of all persons whomsoever.

In witness whereof, the said grantor has hereunto set his hand this 4th day of March, A. D. 1898.

C. S. Cross."

(Pr. tr. pages 135, 136.)

The answer further alleged that Martindale, on account of having received this bill of sale, could not legally receive, or take the written instruments plead in complainant's amended bill of complaint, and that therefore the same were void, as against the claim of Albaugh, the receiver, through this bill of sale of March 4th. Previous to the filing of the intervening petition, and the answer of Albaugh, a large amount of testimony had been taken, by an examiner appointed by the court. (Pr. tr. pages 27 to 127, inclusive.) Very little of this testimony, so taken, is now of any materiality in the case. Upon March 22, 1900, the case was heard before the late John A. Williams, then United States District Judge for the Eastern District of Arkansas, who was holding the court in the District of Kansas. The case was heard upon the evidence taken before the examiner, the oral testimony of Wm. Martindale, C. S. Jobes, Mrs. Cross, Morton Albaugh, John Madden, I. E. Lambert, and certain exhibits, including those above referred to as the foundation of the several claims herein.

At the hearing the appellants placed Mr. Martindale upon the stand as a witness, to prove the execution of the bills of sale, shown by the amended bill, and the purposes for which the same were executed. (Pr. tr. pp. 136 to 139.) The court permitted the receiver (over the objections of appellants) to cross-examine Martindale, as to the bill of sale through which the receiver claimed, for the purpose of establishing the claim of the receiver. The court also permitted the receiver (over the further objections of appellants), after Martindale had testified on such cross-examination, that the bill of sale through which the receiver claimed was not executed by Cross for the purposes stated in the answer of the receiver, to give evidence as to statements made by Martindale, after this action was commenced, and the issues joined (not under oath, or in the presence of or with the knowledge of appellants), to the effect that the bill of sale, set out in the receiver's answer, was executed by Cross for the purposes stated in such answer. This testimony as to Martindale's declarations was the only proof given upon the hearing to support the allegations of the receiver's answer. Upon these declarations of Martindale alone the court determined all the issues in favor of Morton Albaugh, the receiver, and decreed that he was entitled, as such receiver, to the fund, amounting to $53,396.89, and that he should recover his costs. The decree dismissed the intervening petition of Mr. Harvey, the bill of complaint, and the answer and cross-bill of the First National Bank of New York, the answer and cross-bill of Newman, as administrator, and the answer and cross-bill of Martindale. (Pr. tr. pages 173, 174.) From this decree, the appellants herein appealed to the Circuit Court of Appeals for the Eighth Circuit, the assignments of error upon such appeal being practically the assignments of error upon this appeal. (Pr. tr. pages 175 to 205.) Subsequently, in April, 1901, the decree of the Circuit Court was affirmed by the judgment of the Circuit Court of Appeals. The opinion of the United States Circuit Court of Appeals, and its judgment, are

found on pages 205 to 211 of the printed transcript. (See 107 Fed. R., 819.) From this judgment of affirmance this appeal is prosecuted.

Neither Newman, Martindale nor Whitley appealed from the decree of the Circuit Court, to the Circuit Court of Appeals, or from the judgment of the Circuit Court of Appeals to this court.

## SPECIFICATION OF ERRORS.

(Title of cause omitted).

The Circuit Court of Appeals in its consideration of this cause erred in the following particulars, to-wit:

1st. In holding that William Martindale was a party to said action and was interested in such a manner that his interests were so identified with the interests of appellants that statements and declarations made by him were competent evidence against appellants to the prejudice of their claims.

2nd. In holding that the appellants could assert their claims to the fund in controversy only through William Martindale on the principle of subrogation.

3rd. In holding that there was competent evidence to sustain the finding by the trial court that the bill of sale of March 4, 1898, under which the Appellee Morton Albaugh, as receiver, claimed the fund in controversy, was made to secure all the indebtedness of C. S. Cross to the First National Bank of Emporia and that by such bill of sale the fund in controversy stood pledged for that purpose.

4th. In affirming the decree of the Circuit Court and giving to Morton Albaugh, as receiver of the First National Bank of Emporia, all of the fund in controversy and the denying of appellants' rights therein and claims thereto.

5th. In holding that it was not error for the trial court to permit counsel for the receiver of the First National Bank of Emporia to interrogate the witness Martindale, on cross-examination, concerning the bill of sale made by C. S. Cross to W. Martindale, under date of March 4th, 1898, over objections made at the time, and in admitting, on cross-examination, the testimony of the witness with

reference to such bill of sale, and the matters connected therewith, as follows:

"Q. Mr. Martindale did you get another bill of sale besides the ones that have been mentioned by you, from Mr. Cross? —. ———.

Q. Did you receive a bill of sale prior to the July bill of sale? A. Yes, sir.

Q. Have you that bill of sale with you, now in your hands? A. Yes, it is the one or one just like it.

Q. Look it over and tell the court if that is what you received? A. That would be my best judgment.

Q. When did you receive that? A. Early in March.

Q. Perhaps the date of ——? A. I would think so.

Q. What did he say? A. He said he wanted to use $7500.00 in the Leibfried matter, and he wanted to make a mortgage or bill of sale to cover the amount."

6th. In holding that it was not error for the trial court to admit the testimony of Morton Albaugh concerning statements made by William Martindale, after the commencement of this suit, with reference to the bill of sale of March 4th, 1898, under which Morton Albaugh as receiver claimed the proceeds of said property, as follows:

"DIRECT EXAMINATION.

By Mr. Lambert:

Q. Mr. Albaugh you may state if you were in the room when Mr. Martindale had a conversation in regard to what statement was made by Mr. Cross at the time the bill of sale was delivered to him (*in*) March 4th, and if so, state fully what that conversation was? A. Mr. Martindale stated that at sometime in March, 1898, that Mr. Cross in talking with reference to the bank affairs had said that he owed quite a large sum to the bank, that he expected to have occasion to use more of the bank's money and that he gave him this bill of sale for the protection and benefit of the bank.

Q. Did he name any sum of money that he owed the bank, or was any sum of money mentioned in that conversation? A. I am quite sure he did not.

CROSS-EXAMINATION.

Q. Did you state when that was? A. I could not give the exact date this conversation took place?

Q. It was since this suit was commenced? A. Yes."

7th. In holding that it was not error for the trial court to admit the testimony of I. E. Lambert as to statements made by Martindale after the commencement of this suit, concerning the bill of sale of March 4th, 1898, as follows:

> "Q. Now what did he say, if he said anything, about what that (the March 4, 1898, bill of sale) was given for? A. He said Mr. Cross came into the bank and gave him a bill of sale, handed it to him, and he laid it down on his desk, that it remained there until after the bank failed, in his desk, that Mr. Cross said to him at the time he handed him the bill of sale, 'I have used a large amount of the bank's money, I am compelled or expecting to have to use more of it in the Sunny Slope business, and I want to give this bill of sale for the purpose of protecting the bank or to secure the bank.'
>
> Q. Did he name any amount? A. No, sir.
>
> Q. Was the amount $7500.00 mentioned at all? A. It was not.
>
> Q. Were you giving intent interest and attention to what he was saying? A. Yes, sir."

8th. In holding that it was not error for the trial court to overrule motions of appellants to strike out the aforesaid testimony given by the witness Morton Albaugh and I. E. Lambert as to the statements of William Martindale.

9th. In holding that it was not error to admit the testimony of J. M. Johnson as to conversations with W. Martindale, as follows:

> "Q. State whether you had any conversations with William Martindale since the death of C. S. Cross, in relation to the condition of the bank and in any way in relation to the stock on Sunny Slope ranch? A. Yes, I did.
>
> Q. State those conversations in your own way, telling as best you now can, what led up to them and give the purport of them, so far as you can, the exact words used by either Mr. Martindale or yourself or between Mr. Martindale and others in your hearing? A. The Monday morning after the bank closed I went to Mr. Martindale's house. I had just returned from Texas with a string of cattle and was anxious to learn something from headquarters. I went straight to Mr. Martindale and had a personal talk with him. Mr. Martindale tried to make

me believe and did believe it, at the time, that the bank would pay out dollar for dollar and that we would get our money. There was a good deal of rumor about the bank not paying out and I put the question to him pretty hard, as to how he expected that the bank would realize this money. He put a good deal stress on the Sunny Slope business and figured it up. The sale then was advertised. Said Cross had put it at about $40,000.00 and said he thought it would realize $40,000.00 and then the depositors would get that and get it soon, if nothing hindered the sale. Said Mrs. Cross is anxious for the sale to go on and right along on this line and that Mr. Cross already had a proposition of $40,000.00 for the farm and the remainder of the stock and he said he thought it would pay out more than that, probably get $50,000.00 for it and said, 'So you see, John, it will pay out ninety or one hundred thousand dollars and you will get that very soon and then with the good paper, that I know must be good, and then with my property behind that too that is unencumbered, there is no question but what you will get it if I have to go without a home and wear old clothes.' This is (——) substance (——) my conversation with him. I went away feeling very well satisfied.

Q. If you can make it plainer by coming nearer to just giving the words used by Mr. Martindale, please do so in relation to what he said of the funds to be derived from the then proposed sale of the stock on Sunny Slope farm, going into the bank for the use of the depositors? A. I asked him the question if there was any indebtedness, there could possibly be any indebtedness that would come up that would hold this money and keep it from coming in to the bank? 'None in the least. It was an impossibility for it to be.' That is all I now remember.

Q. In either of the conversations, the one had Nov. 21st, 1898, at Mr. Martindale's residence, and the other which you locate at about April of the present year, and at John Henning's office, did Mr. Martindale say anything about himself having any claims or liens upon or interest in any of the property on the Sunny Slope place, other than such interest as he may have manifested by having been a member of the bank? A. Yes. He said he had nothing to do with it. Had no claim on his own property. He said, to use his own words, he was 'like a new-born babe.' He did not have no cinch on the Slope business, had nothing to do with the Slope business, he could not do anything. I told him I thought he was 'a pretty big kid.'

Q. You may state now, whether in either of the conver-

sations, he said to you or to any one in your presence, that he had a bill of sale or a chattel mortgage upon or made any claims to any of the property on the Sunny Slope ranch? A. No."

10th. In holding that it was not error for the trial court to admit in evidence the testimony of C. S. Jobes as to declaration and statement by and conversation with W. Martindale subsequently to the execution of the bills of sale of which appellants claim to be the beneficiaries.

11th. In holding that it was not error for the trial court to admit the testimony of John Henning, as to conversation with W. Martindale, as follows:

"Q. Did you have any conversation with Mr. Martindale after the bank failed about the sale and disposition of the Sunny Slope property? If so, state what he said with reference to the same? A. Well, we had a committee meeting about February 23rd, in my office, and we invited Mr. Martindale there to ascertain what we could find out in relation to the bank matter, that is, what we were going to get; and he went on and said that their resources were two and three times their liabilities; that the bank would get all of the proceeds of Sunny Slope and that he had so many acres of land unencumbered that he was willing to put in and that we would ——100c. on the dollar. And then Johnson he asked him, kind of questioned that, and he went on to Johnson why he would get 100c. on the dollar, and we had quite an argument on that question, and he figured out and said that Sunny Slope would bring $50,000.00 or $55,000.00 something like that, and that he was amply able to make the balance.

Q. What did he say, if anything, about a bill of sale of the Sunny Slope property? A. He did not say anything about any bill of sale. He just talked like this was a sure thing, this Sunny Slope money; talked to us just like good citizens and good neighbors would talk to us; didn't talk like we were going to be thrown out of anything at all, but talked like we were going to get that money."

12th. In holding that it was not error for the trial court to

admit the testimony of George Plumb, as to conversation with W. Martindale, as follows:

"Q. Were you a member of the depositors' committee last December, January and February? A. I was.

Q. I will ask you if you had a conversation with Mr. Martindale some time during the time that I mentioned? A. Yes, sir, a number of conversations.

Q. You may state any conversation you had with him concerning the disposition of the Sunny Slope cattle and the proceeds derived from the sale of the same? A. Why, at the time he said then, speaking about the amount that would probably be paid to the depositors, he said that the Sunny Slope would go in and figured what that would be, and then said, 'I have property and don't think you people are going to lose very much.'

Q. When he said the Sunny Slope proceeds would go in what did he have reference to, do you know? A. Well, we talked of the amount of stuff there was there, of the value of it. He said there had been an offer made to take the balance of the stuff, after the sale, at a price which he named. I told ——— I thought that probably could not be done now, and he said he thought probably it could, and, I think, the man would still take the stuff. I think $41,000.00 is what he said they expected would be what would be gotten out of the balance of the stuff. This conversation was before the sale.

Q. When he spoke of what Sunny Slope woul drealize was, what connection did he draw between the proceeds of Sunny Slope and the First National Bank of Emporia? A. Well, we were talking about what would probably be paid to the depositors and this was mentioned, and we were estimating the amount that would be derived from this source and then from other sources that he knew of. He said there ought to be a good deal of good paper there.

Q. What did he say to you, if anything, about a bill of sale of the Sunny Slope property? A. I don't think I ever had a talk with him about the bill of sale, never mentioned it."

13th. In holding that it was not error for the trial court to admit the testimony of Charles Johnson as to conversation with W. Martindale, as follows:

"Q. Did you have a talk with Mr. Martindale about the personal property out at Sunny Slope at or just after the time

the bank failed? If so, state the time and the conversation as nearly as you can recall it? A. Well, I think I had a talk with him about a week or ten days after the bank closed. A few days afterwards I met him near the opera house, and I asked him about what he thought we were going to get out of the proceeds of those cattle out there, and he said the Sunny Slope money would be the bank's and would go to the depositors, and he went on and told about his own individual land, he had I think several thousand acres of land and it would be taken in and that it would pay out dollar for dollar."

14th. In holding that it was not error for the trial court to admit the testimony of John Stotler as to conversation with W. Martindale, as follows:

"Q. I will ask you if you ever had any conversation with Mr. Martindale or heard any conversation with Mr. Martindale shortly after the failure of the bank? A. Yes sir.

Q. If so, please state where that conversation occurred and the substance of it? A. I had a conversation with him at the Whitley hotel, I judge about a week after the failure of the bank, and Mr. Johnson was with me, Mr. Charles Johnson, and he told us we need not worry about our money. He thought we would get dollar for dollar and went on to state what all they had, various lands, mines, etc. He spoke about the Sunny Slope business. Said the proceeds of that sale would come right in to the bank. Said he did not see why we would not get all our money.

Q. Did he say anything to you about having a bill of sale or any encumbrance of any kind on the personal property at Sunny Slope? A. Not to my knowledge he did not."

15th. The Circuit Court of Appeals erred in affirming the decree for affirmative relief, in favor of Morton Albaugh, as receiver of the Bank, upon the answer filed by Morton Albaugh, as such receiver, as no cross-bill, or petition in intervention, was filed by Albaugh, making anybody defendants, and asking for any affirmative relief, the only pleading filed by him being an answer.

# POINTS OF LAW AND FACT.

## FIRST POINT.

### The Facts Established Upon the Hearing Material to the Specifications of Error.

I.

**FACTS IN SUPPORT OF THE CLAIMS OF APPELLANTS WHICH WERE ADMITTED BY THE PLEADINGS OR PROVED UPON THE HEARING.**

The amended bill of complaint specifically alleged that C. S. Cross, at the time of his death, long prior thereto, and on July 15, 1898, was the sole owner (without any encumbrance thereon except the encumbrances alleged in said bill), of the live stock from the sale of which the fund in controversy was produced. (Pr. tr. p. 11.) The appellant, the First National Bank of New York, specifically admitted this allegation in its answer. (Pr. tr. p. 17.) The intervening petition of Ford Harvey also alleged the ownership of this property by Cross. (Pr. tr. p. 128.) The answer of Albaugh, receiver, expressly admitted that Cross was the owner of this property at the time of his death, and that he was such owner on the 4th of March preceding his death. (Pr. tr. pp. 133-4.) The amended bill of complaint specifically alleged and set out, as exhibits C and D, the execution and delivery of the written instruments alleged in it to have been executed by Cross and delivered to Martindale on the 15th day of July, and the 15th day of November, 1898, through which it, and each of the other appellants, claim their several and respective rights to the fund in controversy.

(See exhibits C and D, pp. 14 and 15, and exhibits B and C, pp. 166, 167, pr. tr.) These two instruments are heretofore set out in the statement of facts.

These allegations of the amended bill, concerning each of these instruments, were admitted to be correct, and adopted by the appellant, the First National Bank of New York (Pr. tr. p. 17), and by the intervening petition of Harvey. (Pr. tr. p. 129.) The answer of Albaugh, as receiver, not only does not deny, the execution and delivery of these written instruments, or either of them, but practically admits their execution and delivery, as alleged in the amended bill, in its attempt to avoid their effect and validity, by alleging, in substance: that, owing to the execution of the bill of sale of March 4th, 1898 (attached as an exhibit D to the answer), Martindale could not legally receive, or take either of these subsequent bills of sale, and hence each of the same were void. (Pr. tr. p. 134.) The allegations seeking to avoid the effect of these bills of sale being mere allegations of conclusions, were of no force or effect.

Dillon v. Barnard, 21 Wall. 437;
U. S. v. Ames, 99 U. S. 45;
Mosher v. St. L. I. M. & S. R. R. Co., 127 U. S. 390;
Interstate Land Co. v. Maxwell Land Grant Co., 139 U. S. 869.

These allegations of the answer, being made to avoid the effect of the written instruments plead in the amended bill, admit the execution and delivery of such instruments.

Clark v. White, 12 Peters, 178;
McCoy v. Rhodes, 11 How. 131;
Clements v. Nicholson, 6 Wall. 299;
Reed v. McAllister, 49 Fed. 16;
Lake Shore & M. S. R. Co. v. Felton, 103 Fed. 227.

In addition to these admissions, Mr. Martindale was orally examined, under oath, as a witness at the hearing, and testified to

the execution and delivery of each of these papers, and that the purpose for which the same were executed and delivered was that alleged in the pleadings of appellants (Pr. tr. pp. 137-8, 150), and this evidence was without any contradiction whatever.

If the court should hold that there was no admission of the execution and delivery of these instruments contained in the answer of the receiver, then as there is no denial in such answer, putting the same in issue, the evidence of the one witness, was sufficient to prove their execution and delivery.

Brown v. Pierce, 7 Wall. 211.

It was admitted upon the hearing (by stipulation signed by each of the parties), that Cross, on July 30, 1898, borrowed of Harvey ten thousand dollars, for which he gave a note that Martindale endorsed as surety for the accommodation of Cross, and that the note set out in the intervening petition was a true and correct copy of the note referred to. (Pr. tr. p. 131.)

It was also testified to by Martindale, and not contradicted, that the indebtedness to the First National Bank of New York, and to the Fourth National Bank of St. Louis, as alleged in their respective pleadings, was correct, and that he was surety for Cross upon such indebtedness. (Pr. tr. p. 147.) The facts concerning the action of Leibfried against Cross, material to this case, were agreed to by stipulation in writing and read in evidence on the hearing (Pr. tr. p. 161; see also bond, exhibit A, Pr. tr. 166), and are as set forth in the statement of the case hereinabove. It was further stipulated at the hearing, that the agreement for the sale of the cattle by the receiver, shown as exhibit E of the amended bill (Pr. tr. pp. 15-16), was signed November 28, 1898. Martindale further testified that the bill of sale of November 15, 1898, was to secure him as indorser upon the several notes held by the appellants. It was testified by Thomas Evans, who was in charge of this personal property for Cross at the time of his death, that on the afternoon of Mr. Cross's death Mr. Martindale told him to see that the

property was to be taken care of as usual, and that a few days later, at the home of Mr. Martindale, he stated to Evans that he had a bill of sale of all the stock on Sunny Slope, and that he wanted Evans to take charge of it, and care of it, as it had been taken care of before, and that the sale which had been advertised to take place should go on. Subsequently he told him the same thing. The witness testified that he followed these instructions. (Pr. tr. p. 167.)

It was therefore established upon the hearing, without any contradiction, that Cross, on July 15, 1898, and up to the date of his death, was indebted to the Fourth National Bank of St. Louis in the sum of twenty thousand (20,000) dollars, evidenced by certain notes, upon which Martindale was an accommodation indorser for Cross; and to the First National Bank of New York in the sum of thirty thousand (30,000) dollars, also evidenced by a note, upon which Martindale was also an accommodation endorser for Cross; that Cross had procured a bond to be given in the case of Leibfried against him, pending in the District Court of Lyon County, Kansas, to answer any judgment that Leibfried might obtain, which was signed by Martindale and Whitley; that while this indebtedness was owing, and the bond was a valid and subsisting one, he (Cross) being the owner of the property from the sale of which the fund in controversy was derived, executed and delivered the written instrument attached to the amended bill as exhibit C (Pr. tr. pp. 144, 167), above set out, whereby, for the purposes stated in said instrument, he pledged this property to Martindale, as trustee, to protect Martindale, and his co-surety, on the Leibfried bond, and to pay any notes on which Martindale was indorser, as surety for Cross; that on the 30th day of July following, Cross borrowed from intervenor Harvey ten thousand (10,000) dollars, on a note of that date, which was endorsed for Cross's accommodation by Martindale; that the day before Cross committed suicide (November 15), he executed and delivered to Martindale the paper shown by exhibit B of the evidence (Pr. tr.

p. 166), which was exhibit D of the amended complaint (Pr. tr. p. 147), to further secure the liability of Martindale, as his surety on each of the notes referred to, as severally held by the appellants; that the liability of Martindale and Whitley upon the bond referred to had ceased; that the property covered by these bills of sale was sold by the receiver under the stipulation made by the parties (Pr. tr. pp. 15, 16, 82 to 84), and the proceeds of the sale substituted in its place.

## II.

### MATTERS PROVED UPON THE HEARING, IN SUPPORT OF THE CLAIM OF ALBAUGH, AS RECEIVER OF THE FIRST NATIONAL BANK.

The bill of sale set out in the answer of Albaugh, and upon which his claim as receiver is based (Pr. tr. pp. 133, 136 (exhibit I, p. 170); heretofore set out in the statement of facts), was proved on the cross-examination of Martindale (over the objection of appellants) to have been executed by Cross and delivered to Martindale about the date of it, Martindale testifying the purpose for which Cross stated he executed and delivered such bill was that he, Cross, at that time wanted to use $7500.00 in the Leibfried case, and desired to make a mortgage, or bill of sale, to cover that amount. (Pr. tr. p. 144.) There was no testimony showing or tending to show that any money was at that time borrowed or taken from the bank by Cross, which this instrument might have secured.

The appellee Albaugh was then permitted (over the objection of appellants) to prove, by his own oral testimony, and that of Lambert, one of his attorneys, that after the commencement of this action, in the January following, and while the examiner was taking the evidence taken by him, Martindale, not wishing to testify before the examiner at that time, met Albaugh, and Albaugh's attorneys, and in a conversation with them Martindale

stated, in substance, that at the time of the execution of the bill of sale of March 4th Mr. Cross came into the bank, and gave him (Martindale) such bill of sale, stating that he (Cross) had used a large amount of the Bank's money, and was expecting to have to use more of it in the Sunny Slope business, and that he wanted to give this bill of sale, for the purpose of protecting the Bank, or to secure the Bank; that he then laid down the bill of sale upon Martindale's desk, where it remained until after the Bank failed. (Pr. tr. pp. 156, 159-60.) It was also testified by Albaugh, and his attorney, that this was the first time that either of them knew of this bill of sale of March 4th, and that it was shortly after obtaining this knowledge that the answer, which was filed for Albaugh, was prepared. (Pr. tr. pp. 158-9.) These statements were denied by Martindale, on his cross-examination by the receiver, and were permitted to be given (over the objections of appellants) to contradict and impeach Martindale as to such matters brought out on his cross-examination. (Pr. tr. pp. 144-5.) The receiver was also permitted (over the objection of appellants), to prove statements made by Martindale, after the failure of the Bank, to J. M. Johnson, John Henney, George Plumb and John Statler (Pr. tr. pp. 94, 106, 107, 109), to the effect that the Bank would receive the proceeds of the sale of the Sunny Slope Farm, and that he (Martindale) had no claim upon the same.

While it is stated, in the statement of the facts of the case made by the Circuit Court of Appeals, that the receiver claimed, and *that it was the fact*,—

> "that Cross in his lifetime had borrowed from the First National Bank of Emporia a large sum of money, for his personal use in conducting the cattle business on the Sunny Slope Farm, and that the bill of sale of date March 4, 1898, was made for the purpose of securing the repayment of the money which he had thus borrowed,"—

the Circuit Court of Appeals was clearly mistaken, as no such claim was made, and there was not a scintilla of evidence in relation to such a claim, beyond the statement of Albaugh and Lambert

as to the statements of Martindale concerning the statements of Cross, and the claims made by Jobes, as receiver, set out in the stipulation for the sale of this property, and made to Evans when Jobes claimed to take possession of the property. (Pr. tr. pp. 74, 103.) The only evidence as to the debt of Cross to the Bank, and how it occurred, is that of H. P. Clark, shown on pages 110 to 112, inclusive, of the record.

It therefore clearly appears, that while the bill of sale of March 4th was proved, the purposes for which it was given, as claimed by the receiver, was only established by declarations of Martindale (not under oath), made after the death of Cross. The most important of these declarations were made after the issues in this case were joined (except the issues made by the intervening petition, and the answer of Albaugh), and were not made under oath, or in the presence of, or assented to, by either of the appellants. Without these declarations, there was not *the slightest evidence* in the case, to establish the fact, that this bill of sale of March 4 was executed for the purpose of in any way securing the Bank, for any indebtedness owing to it by Cross, at the time of his death, and without these declarations there was a total failure to establish the material allegations of the answer of the receiver, of facts in avoidance of the claims of the appellants, or in denial thereof, or in support of the receiver's claim to the fund.

## SECOND POINT.

**The Circuit Court of Appeals erred in holding that the appellants had no right to, or interest in the property, conveyed to Martindale, by the bills of sale of July 15th, and November 15th, 1898, which they, or either of them, could assert, except such as they could assert through Martindale.** (2nd specification of error.)

I.

The fundamental error committed by the Circuit Court of Appeals, is disclosed in the following extract from its opinion (the italics are ours):

> "We think that this contention on the part of the learned counsel for the appellants entirely overlooks the facts to which we have heretofore adverted, namely: that Martindale was himself a party to the action, and that as between himself and the two banks, as well as between himself and F. Harvey, the other claimant, who also held a note of Cross which was indorsed by Martindale—there was a complete identity of interest. It will be observed that the bill of sale dated July 15, 1898, which is the one on which the appellants place their chief reliance, purports to have been made for the protection of Martindale; that is to say, to save him from liability on a certain bond and 'to pay himself for any paper which he and Cross had made and indorsed.' *Harvey and the two banks had no right to or interest in the property conveyed to Martindale which they or either of them could assert, except such as they could assert through Martindale* on the principle of subrogation." (Pr. tr. p. 210.)

The proposition stated by the Circuit Court of Appeals, that the appellants had no right, or interest, in the property conveyed by the bills of sale of July 15th, and November 15th, which they, or either of them, could assert, except as the same was asserted through Mar-

tindale, is utterly opposed to those principles of equity, that are now almost universally recognized, as the principles which should govern in a case like the one at bar.

Under the principles of equity referred to, the execution of the bill of sale of July 15th, 1898, by Cross (assuming that Cross at the time had the legal right so to do) *instantly* created a trust, whereby the property covered by such bill of sale, was at once appropriated for the better security, and the payment, of such outstanding notes, as had then been executed by Cross, and endorsed by Martindale, or which might thereafter be executed by Cross, and endorsed by Martindale, while the title to the property conveyed remained in Martindale, pursuant to such bill of sale. This trust each of the appellants at the time this action was commenced, under the facts of the case, had the right to enforce in a court of equity, in their own names, without the aid or assistance of Martindale, regardless of the fact, that they were not parties to the transaction, and were ignorant of its existence, until after the death of Cross. The commencement of the action, and the claims asserted therein, by the two banks, and the statement of Harvey's claim contained in the stipulation, for the sale of the property, was an acceptance and affirmation of the trust by each one of the appellants.

Bank v. Guttschlich, 14 Peters 19;
Felix v. Patrick, 145 U. S. 317;
Clews et al. v. Jamieson et al., 182 U. S. 461.

If for any reason the bill of sale of July 15th was ineffectual to accomplish this equitable trust, or if the note held by the appellant Ford Harvey, after it came into existence on July 30th, was not protected by it, then the same result was accomplished, by the execution of the bill of sale of November 15, 1898, under the facts, concerning the purposes of its execution, disclosed by the evidence of Martindale.

The equitable principles, applicable to the facts of the case, and the maxims upon which the same are based, are very fully stated by Mr. Justice Matthews, in speaking for this court, in the case of Hampton v. Phipps (108 U. S. 260), as follows:

> "Many sufficient maxims of the law conspire to justify the rule. To avoid circuity and multiplicity of actions; to prevent the exercise of one's right from interfering with the rights of others; to treat that as done which ought to be done; to require that the burden shall be borne by him for whose advantage it has been assumed; and to secure equality among those equally obliged and benefited, are perhaps not all the familiar adages which may legitimately be assigned in support of it. It is, in fact, a natural and necessary equity which flows from the relation of the parties, and though not the result of contract, is nevertheless the execution of their intentions. For, when a debtor, who has given personal guaranties for the performance of his obligation, has further secured it by a pledge in the hands of his creditor, or an indemnity in those of his surety, it is conformable to the presumed intent of all the parties to the arrangement, that the fund so appropriated shall be administered as a trust for all the purposes, which a payment of the debt will accomplish; and a court of equity accordingly will give to it this effect. All this, it is to be observed, as the rule verbally requires, presupposes that the fund specifically pledged and sought to be primarily applied, is the property of the debtor, primarily liable for the payment of the debt; and it is because it is so, that equity impresses upon it the trust, which requires that it shall be appropriated to the satisfaction of the creditor, the exoneration of the surety, and the discharge of the debtor. The implication is, that a pledge made expressly to one is in trust for another, because the relation between the parties is such that that construction of the transaction best effectuates the express purpose for which it was made."

This court fully recognized, and extended this equitable doctrine, in the subsequent well considered case of Keller v. Ashford (133 U. S. 610), where it was said by Justice Gray, in speaking for the court:

> "The doctrine of the right of a creditor to the benefit of all securities given by the principal to the surety for the payment

of the debt does not rest upon any liability of the principal to the creditor, or upon any peculiar relation of the surety towards the creditor, but upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor."

Chancellor Kent, in the leading case of Moses et. al. v. Murgatroyd (1st Johns Ch. 119), stated the rule as follows:

"I shall then consider this fact as well made out, viz., that the assignment of Feb. 12, 1806, though absolute on the face of it, was intended, by the parties to it, to be a security only to the intestate for his indorsement of the notes in question. This being the case, the plaintiffs, as holders of the notes, are entitled to the benefit of this collateral security, given by their principal debtor to his surety; and the case of Maure v. Harrison, 1 Eq. Abr. 93, K. 5 Mich. 1692, is directly to this point. These collateral securities are, in fact, trusts created for the better protection of the debt; and it is the duty of this court to see that they fulfill the design. And whether the plaintiffs were apprised, at the time, of the creation of this security is not material. The trust was created for their benefit, or for the better security of their debt, and when it came to their knowledge they were entitled to affirm the trust and to enforce its performance. This was the principle assumed in the case of Neilson v. Blight, 1 Johns Cas. 205."

See to the same effect, the decision of Chancellor Walworth in Curtis et al. v. Tyler et al. (9 Paige's Ch. 432), see also the English cases therein cited:

Also: Clark v. Ely, 2 Sandf., Ch. 166;
Ten Eyck v. Holmes, 3 Sandf., Ch. 428;
Bank v. Comstock, 55 N. Y., 29.

The principles enunciated by this court, in the cases cited, have always been in full force and effect, within the jurisdiction in which these transactions occurred, as will be seen from the following quotations from the opinions of the Supreme Court of Kansas:

In the case of Seibert et al. v. Thompson (8 Kansas, 65) it is said:

> "The principal creditor is in equity entitled to the full benefit of any security given by the debtor to a surety for his indemnity and for the discharge of the debt; and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence. Maure v. Harrison, 1 Eq. Cas. Abr., 93, pt. 5; Wright v. Morley, 11 Vesey, 12, 22; Moses v. Murgatroyd, 1 Johns Ch. 119, 129; Phillips v. Thompson, 2 id., 418, 422; Pratt v. Adams, 7 Paige, 617, 627; Curtis v. Tyler, 9 id., 432, 435; Ten Eyck v. Holmes, 3 Sanf., 428; Roberts v. Calvin, 3 Grat., 359, 363; Toulmin v. Hamilton, 7 Ala., 362, 367; Ohio Life Ins. Co. v. Ledyard, 8 id., 866, 872; Paris v. Hulet, 26 Vt., 308; Riddle v. Bowman, 7 Foster, 236; Haven v. Foley, 19 Mo., 632; Aldrich v. Martin, 4 R. I., 520. * * * If property is pledged to either the creditor or a surety, though not to the person seeking to charge it, it may be reached by substitution in a court of equity, without regard to the intention of the contracting parties; per Parker J., in Hopewell v. Bank of Cumberland, 10 Leigh., 206, 226. See also McCollum v. Hinckley, 9 Vt., 143, 149."

It will be observed that the authorities which are cited with approval by the Court are authorities upon which we greatly rely for support of the propositions contended for.

In the subsequent case of National Bank v. Ridenour (46 Kansas, 707), the Supreme Court, after reviewing the authorities, speaking through Commissioner Strang, says:

> "It will be seen from the authorities cited that, even where the security is given to indemnify the surety solely, an equitable lien attaches to the securities in favor of the principal debtor, which he may enforce by a direct proceeding. His right does not depend on the law of subrogation."

The Supreme Court of Massachusetts, in the case of Aldrich v. Blake (134 Mass. 582), states the doctrine as follows:

> "A mortgage made by a principal to a surety, to secure the payment of a note, is not to be regarded in equity simply as an indemnity to the surety. It is not important whether it is in

form to pay the debt or to indemnify the surety. Where its object is to provide for the payment of debts, or to enable the surety to do so, he is constituted a trustee for the creditors whose debts are enumerated in the condition. An equitable lien is created in their favor, which is attached to the property in the hands of the mortgagee, which would follow it in the hands of his assignee with notice of the trust, and would also bind it in the hands of the original mortgagor or his assignee with notice of the trust. *Eastman v. Foster*, 8 Met., 19. *Rice v. Dewey*, 13 Gray, 47. *New Bedford Institution for Savings* v. *Fairhaven Bank*, 9 Allen, 175. *Prout* v. *Root*, 116 Mass., 410. *Rindge* v. *Sanford*, 117 Mass. 460."

One of the leading cases upon this question is that of Taylor v. Farmers' Bank, decided by the Supreme Court of Kentucky (87 Ky., 398), from which we quote as follows:

"The rule is well settled that where a security is given by a principal to his surety, it operates *co instanti* as a security to the creditor for the payment of his debt. The right of the latter cannot be defeated, even by the release or conveyance of the surety or mortgagee, unless the liability be contingent, save to a *bona fide* purchaser without notice; and, if contingent, the surety cannot defeat it after his liability becomes fixed. The reason of this rule is that the security given by the principal debtor to his surety is regarded in equity as a trust fund for the payment of the debt. All the property of the principal debtor is liable for his debt; and it does not lie in his mouth, therefore, to say that it is not in trust for the creditor, when pledged to the surety as indemnity. The creditor may, through the medium of the surety, resort to the property thus placed in trust for the payment of the debt, and is invested by equity with all the rights of the surety. In such a case the security is for the debt, as well as the ultimate protection of the surety. It at once is clothed with a trust character, and the creditor immediately acquires a right and interest in it that cannot be defeated by the act of the surety. He becomes a trustee for the creditor."

In Kramer & Rahm's Appeal (37 Pa. St., 71) the Supreme Court of Pennsylvania states the rule as follows:

"So in Cornwell's Appeal, 7 W. & S., 305, Justice Kennedy announces the same rule, saying 'it is a well-established prin-

ciple in equity that a creditor is entitled to all the securities taken by the surety of his debtor, either for the purpose of securing the payment of the debt to the creditor, or for the purpose of indemnifying himself.' To the same purpose are Erb's Appeal, 2 Penna. Rep., 296; Hines v. Barnitz, 8 Watts., 39; Carman v. Noble, 9 Barr, 366; Hancock's Appeal, 10 Casey, 155. The authorities place the principle upon the ground that as the security is a trust created for the better securing of the debt, it attaches to it, and hence it is that it may be made available by the creditor, although unknown to him at the time of the purchase of the security, for which it may have been given as an indemnity. The effect of such a transaction is the placing of means in the hands of the surety by the principal debtor to meet liability on account of his contract of suretyship. It is consequently a trust for that specific purpose, and equity will control the legal title to it in the hands of the surety, so that it may be applied to the object intended, viz., the payment of the debt to the holder."

To the same effect: Rice's Appeal, 79 Pa. St., 168.

As said by the Court of Appeals of Missouri, in the case of National Bank v. Davis (87 Mo. App., 242):

"The property of the principal debtor belongs to the creditor, which, under certain circumstances, the latter may subject in the hands of the surety to the satisfaction of his debt. The holder of such indemnity is a trustee for the creditor. Hampton v. Phipps, 108 U. S., 260; Leggett v. McClelland, 39 O. St., 624; McDougall v. Walling, 21 Wash., 478. If the debtor give his surety indemnity, the creditor may avail himself of it by subrogation, even though in the first instance it was unknown to him. Leggett v. McClelland, ante; Hopewell v. Bank, 10 Leigh., 206; McCullom v. Hinckley, 9 Vt., 143. The rule is well settled that, where a security is given by a principal to his surety, it operates *co instanti* as a security to the creditor for the payment of his debt. The security so given is a trust fund and is regarded in equity as a trust fund for the payment of the debt. Taylor v. Bank, 87 Ky., 398. The security is for the debt as well as for the ultimate protection of the surety."

The rule is concisely stated in the case of Demott v. Stockton Paper Ware Mfg. Co. (32 N. J. Eq., 124), as follows:

"As a general rule, where a surety or a person standing in

the situation of a surety for the payment of a debt, receives security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security; and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance. And the right of the creditor is the same when the security is a mortgage, or other lien given to the surety by the principal after the principal and surety have both become bound, even though there may have been no previous agreement that indemnity should be given; and to entitle the creditor to enforce this right in equity, it is not necessary that he should have exhausted his remedies at law or have reduced his debt to judgment. Brandt on Suretyship, par. 282."

In New London Bank v. Leo (11 Conn., 112), it is said:

"Property mortgaged to a surety to secure him for indorsing the mortgagor's note, whether such property be real or personal, may be subjected to the payment of such note by a bill filed by the creditor, where the debtor is insolvent. In such case the creditor need not levy execution so as to obtain a lien upon property mortgaged to a surety for the same debt for his indemnity, as he has an equitable lien upon the property so mortgaged. The security or fund is created for the payment of the debt, and is a trust existing for that specific purpose, and whether the creditor or the surety be trustee is very immaterial. The trust is created ultimately for the benefit of the creditor."

A clear statement of the law upon this subject is contained in Brandt on Suretyship (2nd ed.) par. 324, as follows:

"As a general rule, where a surety, or a person standing in the situation of a surety, for the payment of a debt, receives a security for his indemnity, and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security; and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence. The authorities place the principle upon the ground that, as the security is a trust created for the better securing of the debt, it attaches to it, and hence it is that it may be made available by the creditor, although unknown to him. The right of the creditor is the same when the security is a mortgage or other lien given the surety by the principal after the principal and surety have both become

bound, even though there may have been no previous agreement that indemnity should be given. To entitle the creditor to enforce this right in equity, it is not necessary that he should have exhausted his remedies at law, or have reduced his debt to judgment. A mortgage given by the principal maker of a promissory note to his surety on the note, conditioned that the principal will pay the note and save the surety harmless, creates a trust and lien which subsist after the creditor's claim on the surety for the payment of the note is barred at law by the statute of limitations, and the fee of the mortgaged property has by foreclosure become vested in the surety. The trust which inures to the benefit of the creditor subsists till the debt is paid, and may be enforced against any one who takes the property with notice. After a trust of this kind has been created, it cannot usually be defeated without the consent of the parties in interest, unless it be by a conveyance to a *bona fide* purchaser without notice."

See to the same effect each of the following cases:

Parris v. Hulett, 26 Vt., 308;

Morrill v. Morrill, 53 Vt., 74;

Greene v. McDonald, 70 Vt., 372;

Roberts v. Calvin et al., 3 Gratt., 359, 363;

Homer v. Sav. Bank, 7 Conn., 484;

Plaut et al. v. Storey, 131 Ind., 46;

Demott v. Stockton Paper, etc., Co., 32 N. J. Eq., 124, 131;

Magill v. Brown et al. (C. C. App. Tex.), 50 S. W., 143;

Union Nat'l Bank v. Rasch, 106 Mich., 319;

Albion State Bank v. Knickerbocker, 125 Mich., 311;

Logan v. Mitchell, 67 Mo., 524;

South Omaha Nat'l Bank v. Wright et al., 45 Neb., 23;

Aultman, Miller & Co. v. Bishop et al., 53 Neb., 545;

Van Orden v. Durham, 35 Cal., 145;

Pierce v. Robinson, 13 Cal., 122;

Pomeroy's Eq. Jur., vol. 3, par. 1419; and authorities cited in note 1;

1 Storey Eq. Jur., par. 499.

II.

It is held by all authorities, that the creditor's lack of knowledge of the fact of the existence of the trust created is utterly immaterial, for the reason that when the creditor learns of it, he has the right to affirm it and enforce its execution. See authorities above cited, and also:

Bank v. Guttschlich, 14 Peters, 19, 31;

Felix v. Patrick, 145 U. S., 317, and cases cited upon this point;

McMullen et al. v. Neils Administrator, 60 Ala., 555, and authorities cited;

Kinsey v. McDearmon, 5 Cole, 326, 395;

Breedlove v. Stump, 3 Yerg., 257;

Osborn v. Noble, 46 Miss., 430, 455;

Price v. Truesdale, 28 N. J. Eq., 204.

The execution of the note by Cross to Harvey, of July 30th, and its endorsement by Martindale, for the accommodation of Cross, placed this note, the moment of its delivery to Harvey, within the security given to Martindale by the bill of sale of July 15th, as disclosed by the terms of such bill of sale.

Swift & Co. v. Kortrecht et al. (C. C. App., 6th Cir.), 112 Fed., 709.

III.

The court below, in holding that these bills of sale were given, as personal indemnity to Martindale, for his sole protection, and hence could only be enforced through his action, based its decision upon a doctrine that has been recognized, in but few jurisdictions in this country, and which is opposed to the great weight of authority, as will be seen by the following citations, and extracts from the leading cases:

In the case of Morrill v. Morrill ( 53 Vt. 74), the Supreme Court of Vermont had occasion to examine this question, and we quote from the opinion in that case as follows:

"This mortgage being valid as between Morrill and Bates, can this oratrix, being the beneficiary under the bond, executed by Morrill and Bates, make it available as a security to her for the amount due from her guardian? The mortgage was executed to Bates as an indemnity only. In some states a distinction seems to have been drawn between cases, where the security is given for indemnity only, and where it is given both for indemnity to the surety, and to secure the debt. Where it is given as security for the debt as well as indemnity, there would seem to be little doubt that the creditor, whether cognizant of the assignment and its purpose or not at the time of the assignment, could, when it came to his knowledge, avail himself of it as effectually, on maturity of his debt, as he could, had it been assigned to him directly.

"But when the assignment is for indemnity only, some courts have held that the surety's rights to apply the security as he pleased is inconsistent with the idea of a trust in favor of the creditor, and that the creditor can only reach the security by way of subrogation after the surety has been damnified, actually or constructively. Rankin v. Wilsey, 17 Iowa, 463; Carpenter v. Bowen, 42 Miss., 28; Hopewell v. Bank, 10 Leigh, 206.

"The great weight of authority, however, is against the propositions, that the creditor's right is rooted in the doctrine of subrogation. The assignment of security by the principal to his surety is an appropriation of funds for the ultimate discharge of the debt, for which he is holden. The surety has the right to apply the security directly to the payment of the debt. If the surety pays with his own funds, he keeps his principal's debt on foot against him, and then applies the security to its payment. Thus in any event the funds of the principal are made to satisfy the principal's debt, and this accords with the purpose of the principal, when he gave the security. If the surety, after the assignment of the security, becomes insolvent, or by any act of the creditor, is discharged from liability, he holds the security in trust for the creditor. Cullum v. Br. Bank, 23 Ala., 797; Clark v. Ely, 2 Sand., Ch. 166.

"The clear deduction from the cases is, that an assignment of securities by the principal to his surety for indemnity merely,

raises an implied trust in favor of the creditor, which, on maturity of his debt, he may enforce, whether the surety has been damnified or not, and irrespective of the question whether the surety or principal, either or both, are insolvent. New Bedford Inst. for Savings v. Bank, 9 Allen, 175; Kramer's Appeal, 37 Penn. St., 71; Rice's Appeal, 79 Penn. St., 168; Seibert v. True, 8 Kan., 52; Ohio Life Ins. Co. v. Ledyard, 8 Ala., 866; Moore v. Moberly, 7 B. Mon., 299; Curtis v. Tyler & Allen, 9 Paige, Ch. 432; Ten Eyck v. Holmes, 3 Sand., Ch. 428; Parris v. Hulett, 26 Vt., 308; 1 Story Eq. Juris., s. 499 (Redfield's ed.); Brandt Suretyship, s. 283."

In the leading case of New Bedford Inst. for Savings v. The President et al. (9 Allen, 175), the Supreme Court of Massachusetts, in discussing this question, say:

"The order of the judge of insolvency which the plaintiffs by their bill seek to have annulled was made on the ground that the mortgages are not to be regarded simply as having been made for the benefit of Sylvanus Allen as indorser, but that they constituted him a trustee for such persons as might become holders of the notes, and that this equitable lien, being attached to the mortgaged property in the hands of Sylvanus, remained and bound the property in the hands of the assignee. The cases of Eastman v. Foster, 8 Met., 19, and Rice v. Dewey, 13 Gray, 47, are relied on as authority for this position. The plaintiffs do not deny the doctrine of those cases, and as it was there settled so recently, and discussed so fully, it cannot be considered as open to discussion here. But the plaintiffs contend that the present case is to be distinguished from them; because in both of those cases the condition of the mortgage was not only that the principal should indemnify the surety, but also that he should pay the debt; whereas, in the present case, it merely stipulates that he shall indemnify the surety, and makes no mention of the payment of the debt. But it is well settled by the authorities that the creditor has an equitable claim to the security, as well when the mortgage is given for mere indemnity as when the condition is added that the principal shall pay the debt. In Moses v. Murgatroyd, 1 Johns., Ch. 119; Phillips v. Thompson, 2 Johns., Ch. 418; Ten Eyck v. Holmes, 3 Sandf. Ch. 428; Riddle v. Bowman, 7 Fost. (N. H.), 236; and Aldrich v. Martin, 4 R. I., 520, the security was given merely to indemnify the indorser, and yet the creditor was held to be entitled to it. The

law is so stated in 1 Eq. Cas. Ab. 93, which is cited in several of the American cases. The equitable right of the creditor does not rest upon contract, but he is put upon the same equitable footing with a co-surety. The law has been long settled."

See also Aldrich v. Blake, *supra*, decided by the same court.

This same question was discussed, and disposed of adversely to the theory of the Circuit Court of Appeals, in the following cases:

Plaut v. Storey, 131 Ind., 46, *supra;*

Union Nat'l. Bank v. Rasch, 106 Mich., 319;

Albion State Bank v. Knickerbocker, 125 Mich., 311, *supra;*

Taylor v. Farmers Bank, *supra;*

National Bank v. Ridenour, *supra;*

National Bank v. Davis, *supra.*

In the case of Swift & Co. v. Kortrecht et al., *supra*, the Circuit Court of Appeals for the 6th Circuit, in passing upon this question, say:

"The rule has long been settled that all securities given by the debtor for the payment of his debt inure to the benefit of the creditor. It is not necessary that they be given directly to the creditor or in express terms contain an agreement to pay the debt. If given to a surety to secure him, equity treats it as collateral to the debt. Some of the decided cases suggest a distinction which would exclude from the operation of the rule those cases where the language of the securing instrument indicates only a purpose to indemnify the surety, and does not indicate any agreement to pay the principal debt. But it does not appear to us that there is any solid ground for this distinction. It rests upon the idea that the creditor's right can be no larger than that of the surety, which is measured by the terms of his security. But, when the debtor procures his surety to become liable for the debt, an implied obligation immediately falls upon the debtor to pay the debt himself. * * The obligation is equally effective as if it were literally expressed. How else shall the debtor save his surety harmless than by satisfying the obligation? There is therefore no enlargement of the debtor's obligation by the subrogation of the creditor.

The Supreme Court of Tennessee, in which state these transactions occurred, has held from an early date that a security such as was this trust deed to Sears of February 20, 1896, inures by the doctrine of subrogation to the benefit of the creditor. The leading case in that state is Breedlove v. Stump, 3 Yerg. 257. Other cases are Robertson v. Sublett, 6 Humph., 313; Kirkman v. Bank, 2 Cold. 407; Kinsey v. Mc Dearmon, 5 Cold. 395; Saylors v. Saylors, 3 Heisk. 530. And decisions of the Supreme Court of the United States are in accord with that of the state upon the general principle. Hampton v. Phipps, 108 U. S., 260, 2 Sup. Ct., 622, 27 L. Ed., 719; Keller v. Ashford, 133 U. S., 622, 10 Sup. Ct., 494, 33 L. Ed., 667. In Hampton v. Phipps the subject was fully discussed by Mr. Justice Matthews in delivering the opinion of the court, and the maxims of equity supporting the doctrine collated."

In Cullom v. Branch Bank, (23 Ala., 797), the court held:

"In some states a distinction seems to be drawn between cases where security is given for indemnity only, and where it is given both for indemnity to the surety, and to secure the debt. Where it is given to secure the debt as well as indemnity, there would seem to be little doubt that the creditor, whether cognizant of the assignment and its purpose or not, at the time of the assignment, could, when it came to his knowledge, avail himself of it as effectually on maturity of his debt as he could had it been assigned to him directly. But when the assignment is for indemnity only, some courts have held that the surety's right to apply the security as he pleased is inconsistent with the idea of a trust in favor of the creditor, and that the creditor can only reach the security by way of subrogation, after the surety has been damnified, actually or constructively. The great weight of authority, however, is against the proposition that the creditor's right is rooted in the doctrine of subrogation. The assignment of security by the principal to his surety is an appropriation of funds for the ultimate discharge of the debt for which he is holden."

See also:

Tompkins v. Catawba Mills, etc., (C. C., D. S. C.), 82 Fed., 780;

Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co., (C. C. App. 6th Cir.), 101 Fed., 699, 703.

We also call attention to those cases hereafter cited under Subdivision II of the third point herein.

Regardless of the proposition stated, it is perfectly clear, from a reading of the bill of sale of July 15th, that it was the intention of Cross to place this property in the hands of Martindale for the payment of the debts, for which Martindale was endorser, and to postpone the claims of the Bank to anything that might be left, after paying such claims. It would be a very forced and strained construction, in a court of equity, to say, that this instrument evidenced an intent, that it was intended as so personal to Martindale, that it could not be considered as pledging the property for the payment of the debts.

It is the law in the State of Kansas, that the beneficiary under such a trust as is claimed in the case at bar, can institute direct proceedings in his own name, and is not compelled to act through the trustee.

National Bank v. Ridenour, 46 Kansas, 707, 715, *supra;*

And this is the doctrine of this court:

Russell v. Clark, 7 Cranch, 89, 97.

## IV.

Under the equitable principles contended for, and fully established by the decisions of this court, and the other authorities cited, appellants were entitled to the fund, under the bills of sale of July 15th, and November 15th, 1898. The July bill of sale is definite as to the property embraced by it, and reasonably certain as to the debts secured. It reads:

> "The property which I transfer to the said Martindale is partially described as follows: all my live stock, cattle, hogs and horses now on Sunny Slope farm, Lyon county, Kansas, together with all other personal property thereon or on farm adjoining. * * * The said Martindale as trustee is first to protect H. C. Whitley and himself upon a certain bond in

the Lyon County court, after which he is to pay himself for any paper upon which he and I are mutually makers or indorsers. The balance, if any, to be paid the First National Bank of Emporia, Kansas, for all matters I owe them."

There is no dispute as to the indebtedness owing appellants from Cross, upon which Martindale was an endorser, to-wit: $20,000.00 to the Fourth National Bank of St. Louis, $30,000.00 to the First National Bank of New York, and $10,000.00 to Ford Harvey. The execution and delivery of the notes and bills of sale is testified to by Martindale (pr. tr. pp. 136 to 138), and the fact is not disputed by any evidence in the case. Copies of the instruments were attached to the original and amended complaints and cross-complaint, and the originals produced upon the hearing. Therefore the appellants had an equitable lien on the Sunny Slope property, by virtue of these bills of sale, and could maintain this suit to realize thereon. Their combined claims exceed the amount of the fund; consequently the whole of it should be decreed to them, unless the court should find, as did the Circuit Court of Appeals, that there was competent and sufficient evidence to establish the fact, that the bill of sale of March 4th, 1898, was executed for the purposes set out in the receiver's answer.

## THIRD POINT.

**The Circuit Court of Appeals erred in holding that there was competent evidence to sustain the finding by the trial court, that the bill of sale of March 4, 1898, was made to secure the indebtedness of Cross to the Bank, and that by reason of such bill of sale the fund in controversy stood pledged for that purpose.** (See specification of error 3, and assignment of error 3, pr. tr. p. 212.)

I.

Albaugh, as receiver for the Bank, was permitted by a written stipulation of all of the parties, to file his answer the day before the hearing, upon the agreement that every allegation in such answer should be considered denied by each party, without the filing of a formal replication. (Pr. tr., p. 131.) This answer plead, in substance, the execution of the bill of sale of March 4, 1898, and alleged that it was executed for the purpose of securing the Bank, in a loan to be made to Cross, and also to secure it, for indebtedness then owing from Cross to the Bank. The court will bear in mind that, on the face of this bill of sale of March 4th, there is nothing to indicate, or suggest, the particular property embraced in it, the consideration for it, or the purpose of its execution. It merely recites:

> "I do grant, sell, transfer and deliver unto W. Martindale as trustee, his heirs, executors, administrators and assigns, the following goods and chattels, viz.: all of my personal property of every kind and description and wherever located, with exception of my personal effects, insurance policies and the contents of my house in Emporia, Lyon County, Kansas; to have and to hold all and singular the said goods and chattels forever."

It was therefore absolutely necessary for the receiver not only to prove the execution, but also to establish the purposes, for which this bill of sale of March 4th was executed, to be those alleged in his answer. At the hearing Martindale was called as a witness by the complainant, to prove the execution, and delivery to him, by Cross, of each of the bills of sale of July 15th and November 15th, and the purposes for which they were executed. This the complainant had a perfect right to do.

Butts v. Privett, 36 Kansas, 711;
Morgan's Assignees v. Shinn, 15 Wall., 105.

Upon the cross-examination of Mr. Martindale, the receiver, without making Mr. Martindale his own witness, and over the objections on the part of appellants, that it was not proper cross-examination, was permitted to interrogate Martindale as to the execution of this bill of sale of March 4th, and the purposes for which it was executed. The following shows all of the cross-examination, with reference to this bill of sale of March 4th (the objections and exceptions being omitted):

"Q. Did you receive a bill of sale prior to the July bill of sale? A. Yes, sir.

Q. Have you that bill of sale with you, now in your hands?

A. Yes, it is the one or one just like it.

Q. Look it over and tell the court if that is what you received. A. That would be my best judgment.

Q. When did you receive that? A. Early in March.

Q. Perhaps the date of it? A. I would think so.

Q. What did he say? A. He said he wanted to use $7500.00 in the Leibfried matter, and he wanted to make a mortgage or bill of sale to cover that amount.

Q. Mr. Martindale, I will ask you this, if you did not state in my office in the presence of Judge Buck, Judge Kellogg, and both of the Maddens and myself and Mr. Albaugh, that Mr. Cross said he was using large sums of money of the bank and that he wanted to use more, and that he wanted to make the bank secure? A. No, sir, I did not say that.

Q. And in that conversation when you — asked to give the entire conversation that occurred between you and Mr. Cross

on this bill of sale, didn't you state there that Mr. Cross said to you, 'I have been using large sums of money for Sunny Slope, and I have to use more money for Sunny Slope, and I want to secure the bank?' A. He didn't say that.

Q. Didn't you state that? A. I don't think I did.

Q. Were you asked there to give all the facts concerning the delivery of that bill of sale to you? A. I think so.

Q. Now in that conversation did you mention that sum you mentioned a few moments ago, of $7500.00? Did you mention that in that room? A. If I did not my attention was not called to it.

Q. No, but you were asked to give all the particulars. A. My best recollection would be that I referred to the Leibfried matter.

Q. Weren't you brought there and requested to state the circumstances surrounding the delivery of this bill of sale? A. All the bills of sale?

Q. And you attempted to do that? A. Yes.

Q. And you say now that you did not say then that it was given because Mr. Cross had been using large sums of money for Sunny Slope, and that he would have to use more? A. I don't believe Mr. Cross ever told me that.

Q. But did you say that? A. I don't believe I did."

(Pr. tr. pp. 144, 145.)

This testimony of Mr. Martindale, not only failed to establish that the purpose for which Cross had executed the bill of sale of March 4th, was that alleged in the answer of the receiver, but completely disproved that it was issued for any such purpose, and disproved the right of the receiver to make any claim through it to this fund. To avoid the result so brought upon himself, the receiver was then permitted (over the strenuous objections of appellants) to give in evidence a verbal statement, made by Martindale to the receiver, and his attorney, in their presence, and in the presence of some other people, but not in the presence of appellants, or their attorneys, or within their knowledge, or consent. This statement, as shown by the testimony given to establish it, was made in the preceding January, *some ten months after this action was commenced*, and nearly two years after the execution of the bill of

sale, and long after whatever rights the appellants had in the bills of sale of July 15th, and November 15th, had fully attached. For convenience, we copy the testimony given by the receiver and his attorney concerning this statement, omitting the objections and exceptions taken thereto, to-wit:

"Q. Mr. Albaugh, you may state if you were in the room when Mr. Martindale had a conversation in regard to what statement was made by Mr. Cross at the time the bill of sale was delivered to him in March 4th, and if so, state fully what that conversation was. A. Mr. Martindale stated that at some time in March, 1898, that Mr. Cross in talking with reference to the bank affairs had said that he owed quite a large sum to the bank, that he expected to have occasion to use more of the bank's money and that he gave him this bill of sale for the protection and benefit of the bank.

Q. Did he name any sum of money that he owed the bank, or was any sum of money mentioned in that conversation? A. I am quite sure he did not.

CROSS-EXAMINATION:

Q. Did you state when that was? A. I could not give the exact date this conversation took place.

Q. It was since this suit was commenced? A. Yes.

Q. What was the date of that conversation? A. I couldn't give the exact date.

Q. Can't you state the month? A. I think it was some time in January.

Q. Of this year? A. This year.

Q. How long did this conversation continue? A. Oh, we were probably present there some ten or fifteen minutes.

Q. Who all were present? A. There was Mr. Lambert, Mr. Huggins, Mr. Madden, Mr. Martindale, Mr. Kellogg. I am not sure whether Mr. Spencer was there.

* * * * * * * * * * *

REDIRECT EXAMINATION:

Q. This was the first information you had of that bill of sale? A. It was; that is the reason my attention was attracted to it.

Q. And upon that bill of sale you set up your answer that you were entitled to the property on that bill of sale? A. Yes." (Pr. tr. pp. 156, 157, 158.)

Mr. Lambert testified as follows:

"Q. Now, was this the first time that you had any definite information in relation to this bill of sale apparently dated March 4th, 1898? A. I had heard rumors of other bills of sale dated before this and that they were supposed to be in the interests of the bank, but had no information at all as to whether such a bill of sale existed or not.

Q. I will ask you, we had gotten out a subpoena, that is to say the administrator had, to take Mr. Martindale's testimony, and his attorneys said he didn't want to go on the stand, but said he would tell you folks anything he knew— A. Yes, Mr. Kellogg said for me not to urge him to go on the stand, that he would be in court, and I said we wanted to know what there was in these bills of sale. He said Mr. Mar tindale did not want to go on the stand and subject himself to cross-examination until his criminal case was out of the way.

Q. Did he for the first time, so far as you had any information, exhibit that March 4th bill of sale? A. Yes.

Q. And then right soon after that you prepared the pleadings that you filed for the receiver? A. Yes, sir.

Q. Now, what did he say, if he said anything, about what that was given for? A. He said Mr. Cross came into the bank and gave him a bill of sale, handed it to him, and he laid it down on his desk, that it remained there until after the bank failed, in his desk, that Mr. Cross said to him at the time he handed him the bill of sale, 'I have used a large amount of the bank's money, I am compelled or expecting to have to use more of it in the Sunny Slope business, and I want to give this bill of sale for the purpose of protecting the bank, or to secure the bank.'" (Pr. tr. pp. 159, 160.)

While Mr. Madden testified to the same facts (pr. tr., pp. 155, 156), his testimony was, by the court, stricken out, and not considered. (Pr. tr. p. 156.)

In addition to the foregoing testimony, the receiver was permitted by the court (over the objections and exceptions of the appellants), to introduce the testimony of J. M. Johnson, John Henning, George Plumb, and Charles Johnson, (pr. tr. pp. 94, 98, 106, 107 and 109), to the effect, that after the death of Cross, and the closing of the Bank, Martindale had stated to these parties, or in their presence,

that the proceeds of the sale of the stock on the Sunny Slope farm should, or would go to the Bank.

The evidence above quoted, and referred to constitutes *all* of the evidence heard by the court, showing, or tending to show, the execution of the bill of sale of March 4th, by Cross to Martindale, and the purposes for which the same was executed, and constitutes the *only* evidence in the case, upon which the decree of the Circuit Court was (or could be) sustained by the Circuit Court of Appeals, or can now be sustained by this court.

The theory of the Circuit Court of Appeals, in sustaining this action of the Circuit Court, is shown by the following extract from its opinion:

> "If Martindale was entitled, as against the receiver, to appropriate the fund in controversy to the payment of his own obligations which were held by Harvey and the two banks, then, and not otherwise, they were entitled to insist that he should exercise this right for their benefit and advantage as well as for his own. In view of these facts, we are of opinion that it was competent for the receiver to inquire of Martindale on his cross-examination concerning the bill of sale of March 4, 1898; that by so doing the receiver did not make Martindale his own witness in any such sense as to be concluded by his statements; and that it was competent for the receiver to show afterwards, as against all of the parties who claimed adversely to him, the admissions which Martindale (a party to the suit, and the one in whom the adverse right to the fund was vested primarily) had made in the presence of several persons, to the effect that the conveyance of March 4, 1898, was made to him, as trustee for the First National Bank of Emporia, to secure whatever indebtedness Cross then owed to the bank, or might afterwards owe to it. * * * We conclude that there was competent evidence to sustain the finding by the trial court that the bill of sale of March 4, 1898, was made to secure all of the indebtedness of Cross to the First National Bank of Emporia and that from and after the execution of that instrument all of his personal property of every kind and description, except his personal effects, insurance policies and the contents in his house in Emporia, Kansas, stood pledged for that purpose."

(Pr. tr. p. 210.)

Passing, for the time being, our claim of errors committed by the Circuit Court of Appeals, in sustaining the Circuit Court in its rulings in respect to these matters, and assuming, for the purposes of the point we are now making (that which we shall elsewhere deny), that as Martindale was a party to the action in the court below, and had filed an answer therein, in which he asked affirmative relief (pr. tr. pp. 18 and 19), the court below had the right, as against him, and his claims, to hear testimony as to statements made by him, subsequent to the filing of this answer, tending to establish the fact, that the claims in his answer were untrue, we emphatically assert, that these verbal declarations of Martindale, made in January 1900, more than eighteen months after the execution of the bill of sale of July 15th, and eight or nine months after the complainant in this action filed its bill, to appropriate the property conveyed under the equities created therein in favor of appellants, not under oath, or in the presence of, or authorized by appellants, or either of them, could not be proof against the appellants of any *fact* contained in such statements, and that the theory of the Circuit Court, as shown by the above excerpt from its opinion, is not sustainable, upon principle or authority.

II.

Under the doctrine of the decisions of this court, and the decisions of other courts of last resort, which we have heretofore cited, the equitable rights of the appellants attached to the property, conveyed by Cross to Martindale through the bills of sale of July 15th, and November 15th, *eo instanti* upon the delivery of such bills of sale, and Martindale instantly became a trustee of the title to the property conveyed, for the benefit of each of the appellants, to the *then* extent of his own rights to have that property appropriated to the payment of the debts of Cross, for which he was surety.

The decisions heretofore referred to, necessarily establish the proposition, that the creditors of the principal debtor, *at some*

*precise point of time,* absolutely acquire the equitable rights in collateral security given to a surety, applicable to their benefit, and if it be possible to say, that those in the case at bar were not acquired instantly the bills of sale were delivered, it must then be held, that appellants acquired the same the moment they severally acquired knowledge of the existence of such bills of sale, and the purposes for which they were made, assented to, and acted, or attempted to act, upon the rights that equity created for them in the property conveyed. The complainant, by filing its bill to appropriate the fund, on February 28, 1899, accepted the trust created, and fully appropriated and sought to enforce it. The appellant, the First National Bank of New York, accepted the trust, appropriated and sought to enforce it, when it filed its cross-bill of April 22, 1899, and Ford Harvey, when he consented to, and signed, the stipulation, authorizing the sale of the property by the receiver, in which it was recited, that he claimed the property, under these bills of sale, accepted and appropriated the trust thereby created; hence it follows: that if the mere execution, and delivery of these bills of sale did not instantly vest the equities in these parties, they certainly were appropriated by, and vested in them, at the dates stated, by the actions taken. The bringing of this action of itself affirmed the trust.

Felix v. Patrick, 145 U. S., 317;
Clews v. Jamieson, 182 U. S., 461.

It would be violative of all equitable principles to say, that after the equities of appellants had become vested, Martindale, without the knowledge, or consent, of appellants, could, by any action on his part, discharge the property from the trust created. Outside of the few courts that hold, that a trustee may do as he pleases with collateral security that is for his own personal benefit or indemnity, the courts are in agreement upon the proposition that the surety cannot, after the equities of the principal creditor attached, by any

act, discharge, or defeat, such equities, or the trust created thereby.

In Colebrooke on Collateral Securities, (2nd ed., sec. 217), it is said:

> "Where the surety himself has received such securities from the principal debtor on account of obligation assumed, equity creates a quasi trust in relation thereto in favor of the creditor and co-sureties until the debt be discharged. The surety has no right to discharge or defeat such trust."

The Supreme Court of North Carolina in the case of Ijames v. Gaither (93 N. C., 363), states the proposition as follows:

> "We think it clearly to be gathered from the authorities that as soon as such a deed of indemnity is given, the equitable right of the creditor attaches to it, and it is not in the power of the surety to put it beyond the reach of the creditor."

To the same effect are each of the following authorities:

Blanton v. Bostic, 126 N. C., 418;
Curtis v. Tyler, 9 Paige, 432;
Clark v. Ely, 2 Sandf. Ch. 166, and authorities cited;
Ten Eyck v. Holmes, 3 Sandf. Ch. 428;
Streeter v. Seigman (N. J. E.), 48 Atl., 907;
McMullen et al. v. Neils Administrator, 60 Ala., 552;
Ohio Life Ins. Co. v. Ledyard, 8 Ala., 866;
Cullum v. Bank, 23 Ala., 797;
McRady v. Thomas, 16 Lea (Tenn.), 173;
Durham v. Craig, 79 Ind., 117;
Taylor v. Farmers Bank, *supra;*
Bank v. Davis, *supra;*
Brandt on Suretyship, *supra;*
Eastman et al. v. Foster, 8 Met. (Mass.), 19;
Aldrich v. Blake, *supra;*
Magill v. Brown et al., *supra;*
Boyd v. Parker & Co., 43 Md., 182;
McCracken v. German Fire Ins. Co., 43 Md., 471;
Ross v. Wilson, 7 S. M. & M., 753;
Osborne v. Noble, 46 Miss., 449.

While we may concede, that the equities in favor of appellants, which attached to the property conveyed by Cross to Martindale, are each controlled, and limited by the extent of the right of Martindale, at *that* time or at the time when such equities attached, to have the property applied for his own protection, yet it must be held, that the right of Martindale, which in any wise limits, or controls such equities, is the right, as it existed at the very time, or times, when the equities in favor of appellants attached to the property, and not the right as it may have existed at some subsequent period of time, after such equities had attached.

It is possible that it is the fact, that the bill of sale of March 4, 1898, was executed by Cross to Martindale to secure the Bank, and if the fact, it would follow: that the bills of sale of July 15th, and November 15th, were only operative to secure Martindale and the appellants, to the extent that anything might be left of the proceeds of the property, after satisfying the claims of the Bank; but if a fact, there is no apparent reason why it should have been permitted to be established by hearsay evidence. It is further possible that the declarations of Martindale to the receiver, in January, 1900—eight or eighteen months after the equities of appellants had attached, and long after this action was commenced—might be evidence, as against Martindale, seeking on his own behalf, (and not as trustee for appellants), to enforce the bills of sale of July 15th, and November 15th, that Martindale had no enforceable rights against the receiver, but this would be purely upon the ground, that the declarations of a party, adverse to his own interest, are always admissible in evidence against such party, and may, as against him, establish facts otherwise not proven. If, however, Martindale, subsequent to the attaching of the equities of appellants to the property conveyed, was powerless to in any way destroy such equities, by releasing the property, or by conveying it to one having knowledge of the same, then it would seem clear that he would be equally powerless to destroy those equities by creating

the existence of facts which would operate to destroy them, through the process of making mere verbal statements to third parties concerning past events, with which appellants had no connection after the time when the rights of appellants had attached. If after the rights of appellants attached, Martindale had executed a release to either the estate of Cross or to the receiver of the Bank, of all his claims upon the property, in order to make good his statements to Johnson and others, such release would perhaps have estopped him from thereafterwards attempting to enforce any claims on his own behalf, under the bills of sale of July 15th, and November 15th, as against the receiver, or the estate, yet, under the authorities, such action, could have had no effect to prevent the appellants from asserting their equities against the property. Under the theory of the court below, Martindale's statements, not acted upon in any way by the receiver, created, as against appellants, who were not parties to such statements, and had not authorized them, facts which instantly operated to divest the appellants of their equities, regardless of the fact, that Martindale, under oath, denied the truth of such statements, and fully proved the right of appellants to enforce their equities.

III.

It is pretty difficult to conceive how Martindale's statement, not under oath, could be held to prove a fact, which, under oath, he swore did not exist. The receiver, not acting upon such statement, to his injury, no equitable estoppel intervened, to prevent Martindale from stating the truth when he was called as a witness. Up to the time the statement was made, the receiver had no real, or tangible claim against the property, or its proceeds. Although he had entered his appearance in the action, and waived the issuance of process in February, 1899, he waited for a year before filing any pleading in the case, and then only filed a claim, based upon the statement of Martindale, witnout any knowledge of his own, as to the truth, or

falsity, of such claim. The receiver first proceeded upon the theory, that Cross, through the wrongful use of the money of the Bank, had acquired the property from which the fund in controversy was derived, and that, therefore, the Bank had the equitable right to trace these misappropriated funds into this property, and appropriate the same for the payment of the Bank. (See the recital in the agreement for the sale of the property, pr tr. p. 15; testimony of Evans, p. 77; and testimony of Jobes, receiver, pp. 103 to 105.) After having the books of the Bank experted by an expert bookkeeper (pr. tr. pp. 84 to 95), the receiver was unable to establish any claim to the stock, on account of the fraudulent use of the funds of the Bank, in the acquirement of it, and was then left at sea, as to any claim he could make in this action, until Martindale made the statement testified to. The circumstances surrounding the transaction show, that Martindale's testimony on the stand was the truth, and that his statement out of court was an untruth. The allegations in the answer of the receiver are to the effect, that Cross desired additional money from the Bank, to use about his farm, and that the bill of sale was given to secure that, and his prior indebtedness, but no evidence was offered to show, that any additional money was taken by Cross, upon, or immediately after the execution of this bill of sale of March 4th. The execution, and delivery, of the bill of sale of July 15th, with the statement contained in it, is, of itself, a sufficient refutation of the facts claimed to have been proved by Martindale's statement.

It would seem, therefore, in any view of the case, that the court had no right to accept this unsworn statement as the truth, and disregard the sworn statement, that, if it had the right to do so as to Martindale, it was clearly error to accept such proof as conclusive against the appellants, and their rights.

IV.

In finding that there existed such an identity of interest between Martindale and each of the appellants, as gave Martindale the right to bind appellants, by a narration of past events, concerning another and independent transaction, not connected with the interests in which it is claimed this identity exists, the Court of Appeals must have determined, that there was a partnership, between Martindale, and each of the appellants, in the rights created by the bills of sale of July 15th, and November 15th, as upon no other theory would it be possible to sustain the views of the Circuit Court of Appeals.

Greenleaf on Evidence (15th ed.), par. 112, and authorities cited.

Such a theory, upon the facts of the case, would be absolutely incorrect.

The "New Orleans," 106 U. S., 13.

Even upon the theory of a partnership, it would be difficult to understand how the statement of Martindale, concerning a past transaction, in which the partnership was not interested, could bind the partnership, where no principle of estoppel was involved.

V.

On its face there is nothing to indicate or suggest the particular property embraced by the March bill of sale, the consideration for it, nor what it was intended to secure. It merely recites:

> "I do grant, sell, transfer and deliver unto W. Martindale as trustee, his heirs, executors, administrators, and assigns, the following goods and chattels, viz.: all of my personal property of every kind and description and wherever located with the exception of my personal effects, insurance policies and the contents of my house at Emporia, Lyon County, Kansas; to have and to hold, all and singular, the said goods and chattels forever."

Such a description is too indefinite and uncertain to give any validity to the instrument as a mortgage. It neither describes any particular property nor gives information by which any property could be identified by it; nor does it suggest what its purpose was.

Tootle, Hanna & Co. v. Eyster, 26 Kan., 589;
Milwaukee, etc., R. Co. v. Milwaukee & West R. Co., 20 Wis., 174;
Rochelean v. Boyle, 11 Mont., 451.

No claim of any kind was made under this until long after this suit was commenced, and neither Cross nor Martindale regarded it as in force when the later bills of sale were given. Even if delivered in March, 1898, for all that is claimed for it, the parties to it could displace it with another instrument (prior to its being accepted, and acted upon by the Bank), as they clearly did by the bill of sale of July 15th, which expressly provided that such claims as appellants' should be first paid out of the Sunny Slope property, "the balance, if any, to be paid the First National Bank of Emporia, Kansas, for all matters I owe them."

The only evidence under oath, explanatory of this bill of sale, is the testimony of Martindale on cross-examination, *supra*.

## FOURTH POINT.

**The 5th specification of error should be sustained.** (See fifth assignment of error, setting out cross-examination, pr. tr. p. 212.)

I.

With the full knowledge, at and prior to the time of the hearing, that Martindale was the only witness, by whom he could expect to prove the execution of the bill of sale of March 4th, and the purposes for which it was executed, the receiver, for the purpose of making such proof, and yet escaping the result of making Martindale his own witness, was permitted by the trial court to make such proof upon the cross-examination of Martindale, over the earnest objections thereto by appellants. (Pr. tr. p. 144.) Not a word upon the subject of this March 4th bill of sale had been mentioned in the direct examination, which had been directed entirely, to the proof of the execution of the bills of sale of July 15th, and November 15th, and the purposes for which they were executed. That the action of the trial court, in permitting the receiver to give evidence in chief, by way of cross-examination of this witness, was error, seems clear.

At a very early date this court, speaking through Justice Story, in Philadelphia & Trenton R.R. Co. v. Stimpson (14 Peters, 448, 461), said:

> "A party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct-examination. If he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him, as such, in the subsequent progress of the cause."

This rule has been consistently followed by this court since that time.

Houghton v. Jones, 1 Wall., 702;
Wills v. Russell, 100 U. S. 621.

See also:

Clary v. Hardeeville Brick Co., 100 Fed., 915.

In enforcing the rule contended for, the Circuit Court of Appeals, which rendered this decision said, in the case of Mine & Smelter Supply Co. v. Parke & Lacy Co. (107 Fed., 884) (the italics are ours):

> "To this cross-examination the plaintiff objected upon the ground that it was not proper cross-examination, and was irrelevant and immaterial, and the court very properly sustained the objection. 1 Greenl. Ev., sec. 445. 'To permit the defendant, under guise of cross-examination, to give evidence in chief, *is not only disorderly*, but *unfair to the plaintiff*.' Hopkinson v. Leeds, 78 Pa., 396, approved and followed in Fulton v. Bank, 92 Pa., 112, 115."

In Da Lee v. Blackburn, 11 Kan., 190, the court held:

> "A defendant while cross-examining a witness of the plaintiff, has no right, except by consent of the parties and permission of the court, to make said witness his own, and then introduce original evidence from this witness for the purpose of proving his own side of the case."

The Supreme Court of Pennsylvania, in Sullivan v. R. Co., 175 Pa. St., 361, said:

> "It (the cross-examination) should be confined to the subject of the examination in chief, and to the credit of the witness, and not used as a means to introduce a defence to the action. When, under the guise of cross-examination, the defendant has improperly brought the attention of the jury to facts upon which he relies to defend the action, they should be considered as evidence in chief for him, and they cannot be made the basis of a compulsory non-suit."

> "A different rule would enable a party to develop his defense untrammelled by the rules which govern a direct examination, and give him an advantage for which we can see no just reason. As to the new matter, the witness becomes his own, and in substance and effect the cross-examination ceases. That is properly such only while it is directed to the evidence given in behalf of the adversary. When it passes beyond that, it becomes the direct and affirmative evidence of the party, and

should be subjected to the appropriate restraints. There is no reason, in the nature of the case, why a direct examination should be guarded against the evil and danger resulting from leading questions which does not apply to an effort upon cross-examination to introduce a new and affirmative defense."

People v. Court, 83 N. Y., 436, 459.

See also:

Greenleaf on Evidence (15th ed.), par. 447.

Conceding that an abuse of discretion must be shown, to warrant the reversal of a case, for the infraction of the rule by a trial court, such abuse of discretion is clearly established in the case at bar, under the facts in connection with the situation and knowledge of the parties. As was said by the Court of Appeals of Colorado, in the case of Tourtelotte v. Brown (1 Colo. App., 408):

"2. The order of introducing testimony and latitude allowed in cross-examination are greatly in the discretion of the court. In this case we think the discretion was abused and prejudicial, not so much in allowing the defense to attempt to establish their contention at that time, but in effect to allow the witness Hurd, in all matters aside from those on which he was examined in chief, to become the witness of the defense without its being obligatory, and for which they were not requried to assume any responsibility, and where the plaintiff was deprived of the right of cross-examination. The rule is well settled that when a witness is allowed to be examined on cross-examination on matters extraneous, not embraced in the direct examination, he is to be regarded as the witness of the party examining, and he is so far concluded by it as to prevent its contradiction. This rule is so well known and established that authorities are hardly necessary."

See also the citations and authorities given under the fifth point.

## FIFTH POINT.

**The 6th and 7th specifications of error should be sustained.** (See 6th and 7th assignments of error covered by these specifications, pr. tr. pp. 213, 214.)

I.

It will be remembered that upon the cross-examination of Mr. Martindale, with reference to this bill of sale of March 4th, he testified that Mr. Cross, at the time he delivered it to him, said that he wanted to use $7500.00 in the Leibfried matter, and wanted to make a mortgage or bill of sale covering that amount; and that he then was immediately asked if he had not, previously, in the office of Mr. Lambert, in the presence of certain parties, stated:

> "that Cross said he was using large sums of money of the bank, and that he wanted to use more, and that he wanted to make the bank secure;"

Martindale denied this, and the question was in repeated in several different forms to him. (Pr. tr., pp. 144,145.)

The receiver placed upon the stand Mr. John Madden, who testified (over the objections of appellants) that Martindale, at the time referred to in his cross-examination, said that Cross stated to him, concerning the bill of sale of March 4th, that he borrowed money from the Bank, and was largely indebted to the Bank, and would have to use more money for Sunny Slope, and that he made out this bill of sale of March 4th and handed it to Martindale. Upon motion by appellants, based upon the same reasons as were stated in the objections of appellants, to the giving of it, this testimony was stricken out (pr. tr. pp. 155, 156); but immediately the receiver himself was called, and examined as to the same matter, and testified to the same statement, over the same objections by appellants, that the matter was hearsay, and an attempt to impeach the witness, who had as

to this matter become the witness of the receiver; and Lambert was also permitted to testify, on behalf of the receiver, over the same objections to the same statement; and the court overruled the same motion to strike the testimony out, as was made, and sustained as to Madden's testimony. (Pr. tr. pp. 156 to 160.)

The testimony of the receiver, and Lambert, was introduced either for the purpose of contradicting, and impeaching Martindale, or for the purpose of establishing, by Martindale's statement out of court, that the bill of sale of March 4th was executed to secure the Bank, or for both purposes. To permit this, for either or both purposes, was, as it seems to us, material error, prejudicial to appellants. To say the least, Martindale, in his testimony concerning this bill of sale of March 4th, should be held to have been the witness of the receiver, and not subject to impeachment, by proof of contradictory statements.

1 Greenleaf on Evidence (15th ed.), par. 442, and cases cited;

1 Wharton on Evidence (3rd ed.), sec. 549;

Best on Evidence (14th Am. ed.), sec. 645;

Becker v. Koch, 104 N. Y., 394, 400, and authorities cited.

Fairchild v. Bascom, 35 Vt., 398, 417.

In 10 Encyc. of Pl. and Pr., 316, 317, it is said:

> "Where a party voluntarily calls a witness in support of his case, he thereby so far vouches for the credibility of such witness that he will not, as a general rule, be permitted to impeach him by proof, either of his general reputation or of his contradictory statements made out of court at another time."

In Ellicott v. Pearl (10 Peters, 412, 441), Mr. Justice Story said:

> "But in truth the evidence was offered to discredit, in part, his present testimony; and certainly the defendants were not at liberty to discredit their own witness by showing his former declarations on the same subject; though they might show by other witnesses that he was mistaken."

This doctrine was fully recognized by this court in the case of Dravo et al. v. Fabel et al. (132 U. S. 487), wherein Justice Harlan, in speaking for this court, says:

> "So that, when the plaintiffs used the depositions of Dippold and Fabel, taken 'as under cross-examination,' they made those parties their own witnesses. While the plaintiffs were not concluded by their evidence, and might show they were mistaken, it could not be properly contended by the plaintiffs that they were unworthy of credit."

II.

That this evidence of the statement of Martindale, was, as to appellants, mere hearsay, would seem to go without saying, were it not for the sanction of so able a court, as the Circuit Court of Appeals, which decided this case. This statement, as shown by the testimony of the receiver, was made in January, 1900—nearly a year after the action had been brought, and while the testimony was being taken in the case. It was a narration of a transaction that had taken place nearly two years before, and as such was a pure and simple narration of past events, and not a statement explanatory of and a part of a transaction in which Martindale was engaged when making it. There was not one element to bring it within the exceptions of the rule permitting hearsay testimony. If Martindale be treated as an agent of the appellants, his statement, not explaining, or forming any part of a transaction of the business of his agency, and concerning a past transaction with which his principals had no connection, could not be used to bind the principals. His statement was not concerning anything that the appellants were interested with Martindale in, but was concerning an independent transaction, with which appellants had nothing to do. It was a statement, as to what another party said two years previously. There is no rule of evidence which is known that would take it out of the category of hearsay.

The "New Orleans," 106 U. S., 13;
Winchester etc. v. Creary, 116 U. S., 161;
Marchand v. Griffon, 140 U. S., 516;
Grimes G. D. Co. v. Malcolm, 164 U. S., 483;
Greenleaf on Evidence (15th ed.) pars. 98 to 115.

Cross's statement, which formed a part of the transaction, could, of course, have been testified to (if it was ever actually made), by Martindale, as a witness, but his mere statement out of court concerning it, was utterly inadmissible.

## SIXTH POINT.

**The 8th, 9th 10th, 11th, 12th, 13th and 14th specifications of error should be sustained.** (See assignments of error, pr. tr. pp. 214 to 217, inclusive.)

For each of the reasons already stated, these assignments of error, covering statements made by Martindale long after the commencement of this action, not under oath, or authorized by appellants, constituted hearsay testimony, and the admission of the same was clearly prejudicial error.

## SEVENTH POINT.

**The Circuit Court of Appeals erred in affirming the decree of the Court below giving to Morton Albaugh, as receiver of the First National Bank of Emporia, affirmative relief, by decreeing, that he, as such receiver, was entitled, upon his cross-bill, filed March 21, 1900, to the fund in controversy.** (Pr. tr. p. 174.)

The [illegible] filed by Morton Albaugh on March 21, 1900, or at any other time, was an answer, thereto on pages 133 to 136 of the printed transcript. The allegations in this answer were put in issue by the stipulation of the parties appearing on page 131 of the record.

While the court, in its decree, called this answer a cross-bill, the reading of it shows that it was only intended as an answer. The last paragraph before the prayer, asks leave of the court, if it should be deemed necessary, to file a proper cross-bill. Upon this answer, the court had no right, or power, to grant affirmative relief.

Ford v. Douglas, 5 How., 143;
Railroad Co. v. Bradleys, 10 Wall., 299;
Fidelity etc. Co. v. Mobile etc. Co., 53 Fed., 852;
Wood v. Collins, 60 Fed. 142; 23 U. S. App., 224;
Hill v. Ryan Grocery Co., 78 Fed. 27, 41 U. S. App., 714;
Owens v. Heidbreder, 78 Fed. 838, 41 U. S. App., 736;
Ringo v. Woodruff, 43 Ark., 498.

While it was suggested in the argument in the court below, that the testimony of Martindale, as to the purpose for which this bill of sale of March 4th was executed was to secure $7,500.00, and that in any event the receiver would be entitled to receive that, such suggestion is not worthy of consideration, as there was no evidence that this money was obtained; and further than that, in equity a party cannot succeed upon a case proved, but not alleged, any more than upon a case alleged, but not proved.

Foster v. Goddard, 1 Black, 506;
Washington R. R. Co. v. Bradleys, 10 Wall. 299;
Grosholz v. Neuman, 21 Wall. 481.

## EIGHTH POINT.

The claims of the administrator, and Martindale, were dismissed by the decree of the Circuit Court. (Pr. tr. pp. 173, 174.) Neither the administrator or Martindale appealed from such decree of dismissal, or from the judgment of the Circuit Court of Appeals, hence the right and interest of the administrator, and of Martindale,

in the fund in controversy, has long been ended, adversely to them.

Chittenden v. Brewster, 2 Wall., 191;
The Quickstep, 9 Wall., 665;
The Stephen Morgan, 94 U. S., 599;
Cherokee Nation v. Blackfeather, 155 U. S., 218;
S. P. R. R. Co. v. United States, 168 U. S., 1.

It therefore follows: That this fund belongs either to the appellants, or to the appellee.

If it should be possible, that this court should find, that neither appellants, or appellee, were entitled to this fund, then, as the administrator's right to the fund has been barred, it should be distributed *pro rata* to all the creditors, and in such case the decree of the Circuit Court should be reversed, and a distribution ordered, after paying all the expenses, including allowances for counsel.

Johnson v. Waters, 111 U. S., 640;
Adams v. Kehlor Milling Co., 38 Fed., 281;
Trustees v. Greenough, 105 U. S., 527;
Central R. R. v. Pettis, 113 U. S., 116;
Dodge v. Tulleys, 144 U. S., 451.

Respectfully submitted,

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